

# The Justinian

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Volume 1983  
Issue 6 November

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Article 1

1983

## The Justinian

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### Recommended Citation

(1983) "The Justinian," *The Justinian*: Vol. 1983 : Iss. 6 , Article 1.  
Available at: <https://brooklynworks.brooklaw.edu/justinian/vol1983/iss6/1>

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"If we are to keep our democracy,  
there must be one commandment:  
Thou shalt not ration justice."  
—Judge Learned Hand

## TOP QUARTER ELIGIBLE FOR 33% TUITION BREAK

Allan Young

With no prior announcement to Brooklyn Law School students or faculty, the Admissions office last week began mailing to the prospective 1984 entering class information about a new Merit Scholarship Program designed to "heighten the prestige of the student body and the institution as a whole."

According to the notice, the "upper quartile of the entering class" would qualify for "scholarships totalling no less than one-third of the tuition charged for the 1984-1985 academic year." The letter points out that "awards are based entirely on academic merit; financial need, therefore, is not a consideration."

Prof. Richard Allan, a member of the Scholarship Committee, expressed surprise that *Justinian* was able to get a copy of a notice which had not yet been released within the BLS community. Prof. Gerard Gilbride, chairperson of the Scholarship Committee, who was made aware of the notice on November 1, four days after *Justinian* obtained a copy, was dismayed that the program appears to guarantee scholarships based solely on undergraduate performance and LSAT scores. "I'm totally averse to selecting students strictly by numbers. There must be guidelines that consider quality," said Gilbride, noting that Dean David Trager had not met formally with the Scholarship Committee prior to the mailings.

### Hasty Decision

Seeking to explain the apparent secrecy with which the notices were dispatched, Trager said that requests for admissions

materials by prospective applicants had been piling up since the summer and could no longer be delayed, necessitating a hasty decision to promulgate and mail information about the Merit Scholarship Program in time to reach the entering class of 1984.

The purpose of the program, according to Trager, is to attract those applicants who would otherwise choose St. John's, Fordham, Pace or Hofstra Law Schools over Brooklyn, if given the choice. He specifically rejected the idea that the program would attract many Columbia or New York University candidates. The idea is to "firm up and expand the top quarter of the class," that is, to encourage the application and acceptance of more people whose academic achievement matches the top quarter of current BLS students, as measured by undergraduate grade-point averages and LSAT scores.

Trager stated that the new program is "an experiment" which would augment, not replace, the existing fund of \$350,000 to \$400,000 set aside for scholarships. Because the Merit Scholarship is still experimental, there is no way to accurately predict how much more money would be needed to support the program, nor how many students would actually qualify for it. The notice seems to guarantee a tuition break of at least one-third to the top 25 percent of the incoming class. The second paragraph of the notice reads in part:

This program is generally available to those admission applicants whose academic credentials would place them in the upper quartile of the entering class.

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## EMPLOYER HIRING PRACTICES EVALUATED

By Michael S. Schreiber

Dean David Trager has appointed a faculty committee to study whether employers who discriminate on the basis of sexual preference should be allowed to use Brooklyn Law School's facilities to recruit prospective employees. The committee is scheduled to make recommendations to the faculty early this spring.

The committee consists of Prof. Emeritus Milton Gershenson, Prof. Bailey Kuklin and Assoc. Prof. Elizabeth Schneider. Though the committee has not yet had an opportunity to discuss the problem, Chairperson Bailey Kuklin says it intends to determine the extent of the problem, what discrimination has occurred and what alternatives exist. Kuklin said the committee "has not been given a mandate to do anything other than investigate the problem and make recommendations in the spring."

The issue apparently arose when Dean Trager first took office this summer. Trager said Dr. Paulette LaDoux, Director of Placement and Career Planning, came to him to discuss the school's policy regarding employers who discriminate on the basis of sexual preference. Under the administration of former Acting Dean George Johnson BLS instituted the policy of not allowing such employers to recruit on campus. According to Trager, LaDoux wanted to know if the school would process applications from students to these employers.

Trager said he had never heard of the policy before. "I thought this was something the whole student body should give its

views" before such a policy is instituted. Trager said that once all the facts are in a decision could be made. In the interim, Trager told LaDoux to follow the old policy and allow the recruiters on campus.

The policy most directly affects the Army's Judge Advocate General's office. JAG explicitly asks whether an applicant is a homosexual or lesbian, and refuses to hire applicants who answer in the affirmative. Several New York area law schools, including Columbia University, New York Law School and New York University, forbid JAG from recruiting on their campuses.

Though the majority of the student body is unaware of this issue, it is beginning to stir debate among the faculty. Kuklin said, "this is a very delicate topic. It strikes people at the level of passion, that is, emotion. It gets people excited."

Several faculty members have already taken stands on this issue. Prof. Henry Holzer sees the problem as one of applicable standards, or lack of them. He said that once the school sets itself up as a "supermoral judge" of other people it becomes impossible to draw a line as to which recruiters will be excluded.

"I personally think it's not OK to discriminate against homosexuals," Holzer said, "but what about banning the UN from recruiting because some people feel it's anti-semitic, or companies which sell to the Soviet Union? It's obviously impossible to make the necessary investigations and determinations. We wouldn't do anything else."

Holzer said that BLS should use the law as the standard for determining which recruiters should be excluded. "If the law says I can't

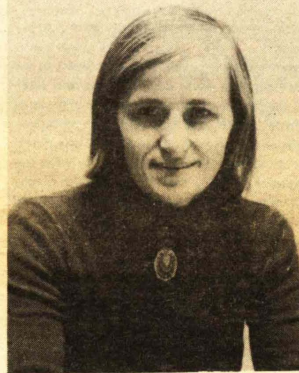
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## CON LAW SEMINAR WINS CASE IN SUPREME COURT

By Risa Gerson

On October 31, the Supreme Court vacated the death sentence of Larry Dean Smith and remanded the case to the Oklahoma courts for further consideration. The attorney of record for the petitioner, Ursula Bentele, a professor at Brooklyn Law School, wrote the petition with the students in her Spring, 1983, constitutional law seminar.

Professor Bentele noted that in an unusual move, the Attorney General of Oklahoma conceded in an answer to the petition that, "... it cannot be said that the Petitioner 'contemplated that life would be taken.'" According to Professor Bentele, the concession was a major factor in the Court's decision to grant *certiorari*, and the *per curiam* opinion explicitly relied on the concession. A separate opinion written by Justice Blackmun and joined by Justices Brennan and Marshall, concurring



in part, and dissenting in part, urged that the conviction as well as the sentence be overturned. Blackmun wrote, "As I read that concession by the State, it means that there was no intent on the petitioner's part to kill, and hence, that he could not be guilty of murder, let alone incur the death penalty."

Professor Bentele noted that when she had finished reading the record, her first reaction was, "That's it?" The evidence seemed scant, and hardly enough to convict someone for murder, Bentele explained. She hypothesized that David Lee, Assistant Attorney General of Oklahoma, who wrote the concession, must have had a similar reaction.

Larry Dean Smith, the petitioner, was arrested for the murder of a 56 year old man who had been found dead in a burnt camper attached to a pick-up truck. A medical examiner testified that the man died of thermal burns and smoke inhalation. The petitioner and his codefendant were apparently arrested because there were motorcycle tracks near the scene, and the defendant owned a motorcycle. In the *cert. petition*, it was asserted that, "The State's case against petitioner relied almost exclusively on his alleged statements to Sheriff Ingram." Sheriff Ingram testified at trial that Smith admitted to having some beers with the man on the night of his death and to watching his codefendant, Ralph Goforth beat and rob the man. Sheriff Ingram further alleged that Smith said he saw his codefendant place "a piece of paper or something" under the seat of the pick-up truck.

The petition argued:

"Nowhere in the 131 pages constituting the evidence at petitioner's trial will the Court find any evidence whatever that petitioner committed any act causing the death of Willard Denning. The record is equally barren of any evidence that petitioner intended or at-

tempted to effect the death of Mr. Denning. At the very most, the evidence implicated petitioner in a robbery of the victim which took place prior to his death. Even if the killing had been established to have taken place during a felony, and if petitioner had been sufficiently connected to that robbery, the conviction could not stand since petitioner was never charged with felony-murder. Given the total lack of any evidence to show that petitioner committed a killing or had the intent to kill, his conviction must be reversed."

Five issues were raised: (1) the sufficiency of the evidence, (2) denial of sixth amendment confrontation rights when the notes from which the prime prosecution witness, Sheriff Ingram, testified were ruled not available to the defense under the work-product rule, (3) the trial judge's refusal to let the jury consider the lesser included offense of second degree murder, (4) whether sentencing to death a 19 year old with no prior record based on a single, questionable "aggravating" circumstance was a violation of the eighth amendment's prohibition against cruel and unusual punishment, and (5) whether excusing veniremen from the jury panel merely because they voiced general objections to the death penalty, was unconstitutional. Although there were other issues raised in the record, which BLS seminar students researched and discussed in their petitions, Professor Bentele chose these five issues because she thought they were the strongest tactically.

The State of Oklahoma cited *Enmund v. Florida* 102 S. Ct. 3368 (1982), in its concession as authority for the proposition that a defendant who has not contemplated that life would be taken cannot be sentenced to death. In *Enmund* the Court stated, "The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not that of those who committed the robbery and shot the victims. ..." Enmund was the driver of a getaway car in a felony murder. In Smith's *cert. petition*, it was argued that Smith, like Enmund, played a minor role in the alleged crime, and therefore could not be sentenced to death. If anything, the petition asserted, Smith was an accomplice in a robbery, but not a participant in a felony in which he could have reasonably expected that a life would be taken. The separate opinion in the *Smith* decision argued that if indeed Smith had no intent to kill, he could not be found guilty of first degree murder. It remains to be seen whether the state's concession will be interpreted to mean that the petitioner lacked the requisite intent to satisfy the definition of first degree murder, or merely that he could

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### EXPANSION SETBACK

Brooklyn Law School's plans to purchase the Republic National Bank building are "for the moment, definitely off," according to BLS Dean David Trager.

The purchase, proposed to solve BLS's growing shortage of classroom, seminar room, conference room and office space, was supposed to go to contract in late September. Negotiations broke down over how much space BLS would have to lease back to Republic to continue its business after the sale was complete. Trager said that under Republic's last offer, "we have to concede to them too much space."

There are "other alternatives coming our way," according to Trager. Though he declined to say what those alternatives might be, he says that if plans work out, they will be "much better" than the Republic National Bank deal.



# Justinian

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## LETTERS

### To the Collective:

At the most recent meeting of the SBA, a resolution was passed condemning the United States for its involvement in Grenada. As a delegate member of the SBA, I feel it necessary to relay to the students of this school the circumstances surrounding this vote, particularly because of its anomalous nature and in light of subsequent attempts by some of those voting in the majority to have such circumstances concealed.

Clearly, an SBA meeting is not the proper arena for resolving political, diplomatic, and military issues. Yet more repugnant than the fact that it was raised was the nature of the resolution itself. It declared that, whereas the United States had violated a half-dozen or so international treaties and pacts in invading Grenada, it resolved that the United States be condemned for its action. The resolution merely recited the names of these treaties. Given the nature of the discussion that night, it was obvious that not a single delegate had more than a perfunctory knowledge of the treaties mentioned in the resolution.

Certainly none were qualified to determine whether or not they had all been violated. Consequently, it was suggested that, if we were to be made to vote on this issue, at least the references to international law be expunged. After all, we reasoned, these are arcane provisions whose violation is not a certainty even among experts in the field. And yet the request was refused. The resolution passed by a vote of 11 to 10, with 4 abstentions. Eleven people, whose knowledge of the named laws was woefully inadequate, nonetheless agreed that the terms had been violated. Ironically, one of the reasons expressed for retaining the mention of these laws was that, as law students, our proposal should be backed by legal authority. What made such a position all the more ludicrous was the admission by the resolution's proposer that his research of the legal issues was based, in large part, upon analysis appearing in the *New York Times*.

Near the end of the evening, some delegates proposed that, given the special nature of the vote and its close result, the editors of the *Justinian* be asked to record the tally. At first our entreaty was attacked on Parliamentary procedural grounds. Then it was declared that such a proposal violated the spirit of the First Amendment, since it would involve telling the *Justinian* what to publish. In fact, we were merely asking that our votes be recorded. Indeed, earlier in the evening the entire SBA considered asking the *Justinian* to print a questionnaire aimed at eliciting students' ideas about clinics. And yet, not a single voice was raised in defense of freedom of the press on that occasion. The maneuvers and allegations of repression, designed to insure that their ideological beliefs be hailed with a

clarion voice, unfettered by any hint of opposition.

Indeed, such beliefs lay at the heart of the problem. For worse than the structural flaws of the resolution itself, or of the repression surrounding it, was the motive for its proposition and passage. And the motive was purely political, and there was no intent to serve the students of this school. The resolution merely provided eleven delegates the opportunity to present their political views to the student body. No valid purpose was served.

Judged by any standard, the matter was inappropriate for consideration. The meeting became a polemic exercise, displaying a lack of concern for students and giving off the distinct odor of selfishness and self-indulgence. About 45 minutes of the 2½-hour meeting were spent debating what was, for our purposes, a non-issue. Meanwhile, pressing matters—those that the students presume receive our consideration—were neglected.

The resolution was inappropriate for still another reason, in that it belied our duty to act as representatives. When a citizen votes in a congressional election, he does so with full awareness that the candidate may some day cast a vote on an issue such as Grenada. But when a student votes in a school election, he does so with no such belief. And yet eleven delegates, acting with no authority other than as representatives of the student body, had no compunctions about raising their hands in condemnation of the United States.

Should this be our legacy for future students and delegates? Have we not been taught to analyze a problem dispassionately, and with professional integrity? The hope here is that future SBA meetings will address only that which is appropriate for consideration; that future decisions will be approached intellectually rather than viscerally, with an informed background and not in an atmosphere of pervasive ignorance. It would behoove the SBA delegates to remember that ours is not an opportunity, but a duty.

—Stuart Diamond

### To the Collective:

As a moral human being, I once again feel ashamed of being American. Because in a democracy, we all must take responsibility for our government's actions. We allowed our massive military Goliath to sneak up on a sleeping David (it was 5:30AM when we attacked Grenada; so much for Reagan calling others "cowardly"), and we even had air support. We allowed the largest navy in the world to overwhelm a country without a navy or an air force. We allowed Ronald Reagan to play John Wayne and his hellcats. (Only here does the *Justinian* go back to make up when the shooting is over.) Worst of all and most seriously, we allowed ourselves

## EDITORIALS

### TRAGERNOMICS: TRICKLE-DOWN ACADEMICS

Is it simply a stroke of luck that the current first-year class has the highest median undergraduate grade-point average in our law school's history? Is it a mere whimsy that has compelled the Admissions Committee to reduce enrollment by 29 percent in three years?

The winds of change are in the air. Dean Trager's ultimate goal is to revalue the Brooklyn Law School diploma with a number of drastic and *expensive* reforms. It is hardly a notion of complex accounting that a higher faculty/student ratio requires each student to pay higher tuition: a class of 300 (projected for September 1984) has a heavier individual financial burden than a class of 421 (entering class of 1981). And who are these excised 121? The bottom 29 percent no doubt.

Another bit of simple arithmetic gives any student in the "bottom" 75 percent (after the initial bottom 29 percent is cut out) reason for alarm: if the top 25 percent qualifies for "automatic" merit scholarships by virtue of class standing alone (see related news story), legal education at BLS becomes more expensive still, as three-quarters of a *smaller* base subsidizes the education of an academic elite. The Merit Scholarship Program, as yet not officially announced to the law school community, would produce an estimated \$2,400 disparity in tuition between the "best" and the "rest." The hope, of course, is that the "best" students will someday land the "best" jobs and generously remember their munificent *alma mater*. The danger is that classmates grow to resent each other as they sit side by side taking the same courses but paying enormously different tuitions. Making it to the top will become even more cut-throat as additional monetary motives are added to the competitive brew.

Dean Trager poetically urges that we all bask in "the glow of refracted light" when the school invests in its gems, and that "a rising tide lifts all boats." Metaphors, however, tend to cloud issues and distract attention from more mundane realities like the hardships of putting food on the table and paying the landlord.

No one argues that someone has to pay the price of an enhanced reputation. What we question is the methods used and the price to be paid. Certainly, our 12,000 alumni are a vast but little-used source of scholarship funds. The Trager administration is headed in the right direction in its appointment of Johanna Gurland to track down alumni and elicit their support. But that project, we fear, will take too long to help defray the more immediate cost of the Merit Scholarship Program and reduced enrollment.

A school's prestige is also largely based on the renown of its faculty. With possible reductions in anticipated faculty salaries to help pay for the Merit Scholarship Program, one wonders whether any law professors of national repute could possibly be encouraged to teach at Brooklyn.

We don't doubt that Dean Trager's plan to elevate the reputation of Brooklyn Law School is motivated by anything but a profound devotion to the institution. But the reputations of law schools don't change overnight; they evolve. It appears that the Dean wants to see in a few short years what took decades for other law schools to accomplish. Such rapid build-up does have its price—not only in the pocketbook, not only in the changed character of a school which wipes out its bottom 29 percent, but in the resentment fostered by attempts to establish a new intrascholastic hierarchy based on brains and money.

It is most unfortunate that the Dean instituted the Merit Scholarship Program without prior consultation with the faculty, students, or special Scholarship Committee. We hope that such unilateral executive action is not a signpost of the new "Tragernomics."

Since 1901, BLS students have felt the common bond of those who ride in the same boat. The "new" BLS threatens to dump some of us overboard and create a caste system for the ones left on board.

A "rising tide" may not, after all, lift as many boats as it capsizes.

## 10¢ A DANCE

Thank you Dean Trager for making Brooklyn Law School number one. We are right up there with New York University and Columbia Law Schools now. A common thread running through all three of these institutions is the 10 cent photocopy. In fact, Columbia, which also uses Sharp copiers, offers money saving copy cards as does BLS. Here, however, there is a difference—Columbia's cards are cheaper.

No one can argue that there was an urgent need to change photocopy concessionaires. For too long we suffered with 10 aging machines that ran out of paper early in the day, failed to give change, and produced illegible copies. We now have eight new machines that suffer the same ailments.

According to Professor Charlotte Levy, who assisted in the change, the consensus between the Student Bar Association and the administration was that good machines in working order would justify the price increase. We await the justification. Machines that give us nothing new but a cordial high-tech HELLO hardly justify a 100% price increase. That good machines cannot be had at five cents a copy is simply untrue.

Someone did not do his homework. New York Law School has been able to maintain the five cent copy without sacrificing quality.

If New York can do it, why can't we? Adequate photocopying facilities are essential in any law school. Law students have enough worries, and photocopying should not be one of them.

another taste of fascism. If we should linger there, mankind's future is in considerable doubt.

Hypocritically, we acted like we continually condemn our enemies of acting. Thus, world contempt has once more been shifted to our shores. World opinion generally scorns at a powerful nation invading—like the Germans invaded Poland and France—one of the militarily weakest. Where is the sport, America? A country of 200 million invading a tiny island of 110,000, and we call ourselves "the land of the brave." The stark reality is that Grenada is largely inhabited by the elderly, the young, and women. (The first American was reportedly killed by a 78 year-old man.) So it really matters not how many automatic rifles a people have if the people do not have anyone to use them. Not to mention that with Reagan's finger on the nuclear button, I am not overly concerned with a bunch of auto-

matic rifles, no matter how many. It has been scientifically proven that even the most powerful of automatic rifles—and some of the ones on Grenada date back to 1870—cannot reach America from Grenada. So much for the military threat.

I was ashamed of those apple-pie dripping students. They kissed the ground as if they have known danger, even though history has shown that it was more dangerous to be a Kent State student in 1970. But these medical students know not danger; they know not real fear, the profound fear that lays on your heart. They know only selfishness. (While people, mostly Grenadians, were being killed, I heard one pathetic student lament about how he might lose some credits because of the incident.) Live in Beirut over the last two years, then you know real danger. Be black in South Africa seeking majority rule, then you know

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# CONSTITUTIONAL CRUSADER

by Leah Margulies and Scott Pollock

On Wednesday, October 19, Professor Arthur Kinoy came to Brooklyn Law School to discuss constitutional law, the civil rights movement and his own career which, since the 1940's, has been dedicated to the struggle for human rights in a variety of contexts. The program, sponsored by the Brooklyn Law School Lawyers Guild, included a lunch for Kinoy and 20 faculty members and students, a general address to approximately 150 members of the BLS community, and a seminar in which he and 50 students and faculty members discussed several cases he has litigated before the Supreme Court.

*Kinoy's history as a people's lawyer*

Kinoy holds the position of distinguished Professor of Law, Rutgers University School of Law, where he teaches Constitutional Law, Law of the First Amendment, and the Law of Civil Rights. He is vice-president and co-founder of the Center for Constitutional Rights and a member of the National Executive Board of the National Lawyers Guild. In the 1950's, as Associate General Counsel of the United Electrical Workers, he fought attempts by the House Un-American Activities Committee and grand juries to destroy militant labor organizing, and as a private practitioner he represented many witnesses before HUAC. He was one of the appellate counsels for Morton Sobell in the Sobell-Rosenberg case.

In the 1960's, along with other guild attorneys, he worked in the South as one of the lawyers for the Mississippi Freedom Democratic Party, the Student Non-violent Coordinating Committee, the Southern Conference Educational Fund and the Southern Christian Leadership Conference. In 1965 he argued the landmark case of *Dombrowski v. Pfister*, 80 U.S. 479 which extended the protections of the First Amendment to state proceedings which have a "chilling effect" on freedom of speech.

In 1966 he obtained the first federal injunction in history against the House Un-American Activities Committee while representing student anti-war activists. He was physically removed from the Committee room and arrested for attempting to engage in legal argument with the Committee, but the charges were subsequently thrown out by the U.S. Court of Appeals for the District of Columbia.

In 1969 Kinoy successfully argued *Powell v. McCormick* 395 U.S. 486 (1969), in which Adam Clayton Powell's exclusion from Congress (which had been upheld by then Circuit Court Judge Warren Burger) was found unconstitutional in Earl Warren's valedictory opinion.

In 1972 Kinoy again argued before the Supreme Court in the case of *United States v. United States District Court* 407 U.S. 297 (1972), which rejected Richard Nixon's claim of "inherent powers" of the President to authorize warrantless wiretaps against domestic political organizations. This case may have been the prelude to the bungled Watergate break-in of the Democratic National headquarters which led to Nixon's resignation.

More recently Kinoy has testified before House Committees concerning the right of the Puerto Rican government to self-determination, and to the causes of racial violence in America. His autobiography *Rights on Trail—The Odyssey of a People's Lawyer*, has been published by Harvard University Press and he is currently at work on a book about the meaning and impact of the 13th amendment.

*Experiencing Constitutional Challenges as Political History*

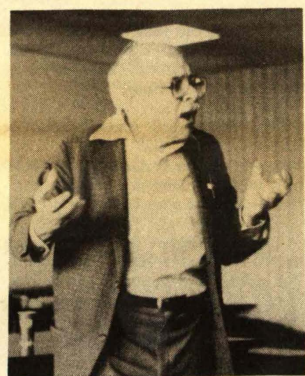
Kinoy spoke passionately about his life as a constitutional scholar and a "people's lawyer." Through story-telling, he shared the political and legal importance of crucial cases that exemplify the struggle to preserve fundamental civil rights. Kinoy demonstrated how he believed law should be taught—as part of a living history of people striving to better their own lives and the world. Through describing two of the cases he argued before the Supreme Court, Kinoy's vision of legal education and legal activism is that learning the law

is more than learning court decisions; it involves an understanding of the historical conditions and social movements which contribute to the law as a process of change.

Kinoy's description of his legal and personal experiences allowed his audiences to understand his life as a people's lawyer—the necessity of endless energy and the search for litigation strategies which, by their very nature and essence, expose threats to constitutional government.

*United States v. United States District Court of Michigan*, 407 U.S. 297 (1972)

In 1970, President Nixon's Justice Department, as part of a nationwide campaign to stifle dissent, pressed conspiracy charges against Michigan's White Panther Party who was organizing opposition to the Vietnam War. Although conspiracy trials were going on all around the country (Kinoy had just completed, with two women lawyers, the 547 page appellate brief for the Chicago Seven), this one was different. In response to a motion to disclose wiretaps (filed automatically by the defense lawyer in the 1960's conspiracy trials), the U.S. attorney conceded that the government had wiretapped the defendants without a warrant but argued that it was legal. The U.S. attorney produced an affidavit from then Attorney General John Mitchell stating that Mitchell had authorized the secret tap on the authority of the president because of the necessity to protect the U.S. from domestic subversion.



The District Court judge rejected Mitchell's contention that the President had inherent powers to reach beyond the Constitution, and ordered the government to produce logs of the intercepted conversations. Instead of turning over the logs and going ahead with the trial as expected, the Department of Justice took a highly unusual step. They directly appealed through suing out a writ of mandamus, which named the trial judge as the defendant. If issued, it would have directed the judge to reverse his decision. The Appeals Court, however, upheld the lower court decision. The Justice Department then appealed directly to the Supreme Court. The Justice Department argued that the President had "inherent powers" which permitted him, whenever he considered it necessary to do so, to suspend provisions of the written constitution. The Justice Department asserted that the traditional power of King George III, against whom the colonists rebelled, justified their position that "inherent powers" gave the President authority to take any action required to protect national security—even suspending the fourth amendment of the Constitution which protects against illegal searches and seizures, including wiretapping.

Did Nixon believe the Supreme Court would override the written Constitution? According to Kinoy, Nixon may have believed the Supreme Court would legally sanction the abandonment of one of the most elementary constitutional protections since the Court was, at that time, known and referred to as "the Nixon Court."

Kinoy's description of the events surrounding *United States v. United States District Court*

## PINTO COMES TO BROOKLYN

by Steven Eisenstein

Professor Arthur Pinto is one of the newest additions to the Brooklyn Law School faculty, teaching Corporations and Federal Securities Regulations. Born and raised in Connecticut, Professor Pinto graduated from Colgate College and New York University Law School. Upon graduation, he joined the New York firm of Weil, Gotshal & Manges. After three years in practice, Professor Pinto decided that the academic world called louder than the commercial.

In his search for a suitable position, he came to Brooklyn Law School where he was interviewed under the stewardship of then Dean Lisle. Although he accepted a position with Seton Hall Law School in Newark, he maintained the ties with Brooklyn that he had begun to foster during the interview process. He strived to preserve friendships with the people he had met here: Professors Poser, Zaretsky, Berger, Gora, Yonge, and Professor Caplow with whom he had gone to law school. After visiting professorships with Rutgers and George Washington University, Professor Pinto received his chance to try Brooklyn.

His impressions of Brooklyn have been favorable. According to Professor Pinto, Brooklyn is lucky to have a good physical structure and an active dean. He believes the school is much better than its reputation.

Professor Pinto said that statistically, the students at Brooklyn are quite close to those at Seton Hall. However, the students in his Securities class strike Professor Pinto as exceptional, perhaps the best he has ever had. He attributes this to the basic differences between

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ween the New York and the New Jersey legal communities. New Jersey is a litigation state, and the best students are attracted to the practice courses. In New York, securities law is a major field and consequently the best students are drawn to those courses. This is not to say that the students at Brooklyn are perfect. Professor Pinto does have some complaints. The students here are too passive. They don't seem to be involved in anything. Students rarely come up to talk to him or to have lunch with him in the cafeteria. While this may be attributable in part to the fact that he is new here, in general there is too wide a gap between the students and the faculty.

Professor Pinto knows whereof he speaks. His academic career has thus far been replete with examples of involvement with students. At Seton Hall he was the Law Review Faculty Advisor, head of the Judicial Internship Program and the S.E.C. Observer Program, faculty advisor to the Moot Court Team and Associate Dean for Academic Affairs. Because of these experiences, Professor Pinto encourages any student who feels so inclined to approach him and strike up a conversation.

As to his subject matter, Professor Pinto is fascinated by business. It's what makes our economy run. He enjoys dealing with people who think the subject matter is boring and convincing them otherwise. In class, Professor Pinto tries to get away from black letter law and teach the policies underlying it. He hates to lecture and would prefer students to participate in the classroom discussions and to ask questions. That makes the class more interesting for all concerned.

As for the future, Professor Pinto is at Brooklyn for one year though there is an option for more time. He has not decided yet whether to stay at Brooklyn. At present, he is working with Professor Poser on a casebook in Corporate Finance to be published in 1984.

## PINTO ON INSIDER TRADING

The following article is an excerpt from *Transactions On or Off the Stock Exchanges by Corporate Directors Involving Shares of Their Own or Related Companies* ©The American Journal of Comparative Law 201 (1982). Some footnotes have been omitted, or modified, others renumbered. Presented at the XI Congress of Comparative Law in Caracas, Venezuela, by Arthur R. Pinto

### Federal Law

The stock market crash of 1929 and the subsequent New Deal legislation regulating securities have resulted in extensive federal regulation of securities transactions. The Securities Act of 1933 (the "1933 Act")<sup>1</sup> primarily focuses on the initial distribution of securities, whereas the Securities Exchange Act of 1934 (the "1934 Act")<sup>2</sup> primarily focuses on post-distribution trading. In the 1934 Act, Congress established the Securities and Exchange Commission ("SEC"), an administrative agency<sup>3</sup> with the power to promulgate rules<sup>4</sup> and enforce the Acts.

Underlying both the 1933 and 1934 Acts is the idea of full and fair disclosure and the prevention of fraud and manipulation in the sale and trading of securities.<sup>5</sup> In enacting the legislation, Congress was aware of insider use of material nonpublic information and the common law view of such activity and dealt with the problem in both Acts. In transacting with their companies' securities, directors are subject to the disclosure requirements of the 1933 Act and the continuous reporting requirements of the 1934 Act, the prohibition of purchases of sales within a six month period,<sup>7</sup> and the regulation of manipulative and deceptive devices.<sup>8</sup>

### 1. Rule 10b-5

In 1942, the SEC promulgated Rule 10b-5<sup>9</sup> pursuant to Section 10(b) of the 1934 Act.<sup>10</sup> The rule is modeled after Section 17 of the 1933 Act,<sup>11</sup> which is directed only at fraud in the offer or sale of securities. Rule 10b-5, however, is directed at fraud both in the purchase and sale of securities.

Neither Section 10(b) nor Rule 10b-5 are specifically directed at insider trading activity. Early views tried to limit them to tradi-

tional fraud or to transactions involving broker-dealers. Courts, however, along with the SEC through its enforcement powers, have given expansive meaning to the Rule although recent decisions have cut back on its scope. Given the broad language of Section 10(b) and Rule 10b-5, they have generally been accepted as a "stop gap, plugging a loophole and catchall" with the goal of "lessening... fraudulent and sharp practices in the securities market."<sup>12</sup> Both the courts and the SEC have taken the prohibition of "any deceptive devices or contrivances" found in Section 10(b), and have expanded the traditional tort concept of fraud and the common law view of use of inside information.... Rule 10b-5, among other things, prohibits nondisclosures of material facts by directors in both the purchase and sale of securities. The rule has great impact because it applies beyond traditional insiders,<sup>13</sup> and liability has been extended to nontrading parties.<sup>14</sup> It affects the purchase and sale of securities in interstate commerce,<sup>15</sup> including those of closely held corporations as well as publicly held companies.<sup>16</sup> The use of Rule 10b-5 more than any other theory of law has dominated the use of inside information in the purchase or sale of securities.

Although the SEC clearly has the power to enforce the Rule,<sup>17</sup> it was the finding of an implied private action under Rule 10b-5 which greatly expanded its use against parties buying or selling on insider information. In *Kardon v. National Gypsum*,<sup>18</sup> a federal district court found that Congress intended an implied private right of action under Section 10(b) and Rule 10b-5. Although the decision has been criticized, it was recognized by the Supreme Court,<sup>19</sup> and provides an important means of enforcing the Rule.

The development of a Rule 10b-5 private cause of action and the elements underlying it have focused on the elements of the common law action in fraud. These include issues of nondisclosure; materiality; scienter; privacy; reliance and causation. In order to determine which of the common law elements must be proven under Rule 10b-5, courts have looked to Congressional intent. Since there is little legislative history on Section 10(b), courts have had to find this intent through statutory interpretation of the language of section

Continued on page 10



# ANNOUNCEMENTS

The Justinian, Vol. 1983 [1983], Iss. 6, Art. 1

## LEGAL AID

Students interested in applying to the Legal Aid Society for full time employment, please give your resume, writing sample and school transcript to the Placement Office no later than November 22, 1983.

## POLITICAL ACTIVISM

On November 16, 1983 at 4:00 P.M. in the student lounge, the National Lawyers Guild will present Arthur Greene and Martin Stolar speaking about political activism and its consequences for admission to the Bar.

Arthur Greene graduated from Brooklyn Law School in 1950 but was refused admission to the New York Bar because of his political affiliations. He was not admitted until 1978.

Martin Stolar was admitted to the New York Bar in 1968. Subsequently, he was denied admission to the Ohio Bar for his refusal to answer certain questions relating to his political affiliations. The United States Supreme Court upheld his right to refuse to answer such questions in *In Re Stolar*, 401 U.S. 23 (1971).

## 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 December 5.

## PLACEMENT

Frederick A.O. Schwarz, Jr., Corporation Counsel, will head a panel of speakers who will explain the functions of the New York City Law Department on November 16, from 1:00 to 2:00 p.m. in the Student Lounge. Diane Kemelman, Administrative Assistant Corporation Counsel, and a BLS alumnus will sit on the panel. Refreshments will be served. All welcome. Sign-up on board directly outside of Placement Office if you plan to attend. (Students interested in career opportunities with the Corp. Counsel should attend.)

## CURRICULUM COMMITTEE

The curriculum committee is currently investigating the possibility of developing an experimental first year curriculum for next year. We would like comments from students on the value of the present first year program. We would also like suggestions for change, including proposals for an entirely different program. Please submit all comments, suggestions, and proposals to Deborah Deutsch-Perez (mailbox in the Law Review office) or Jim Markarian (mailbox no. 448) by November 23. Thank you.

## 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 next issue is December 5.

# MOOT COURT UPDATE

David Niebauer

## BENTON TEAM

The Benton Moot Court competition was held in Chicago on October 28 through 30. The BLS team consisted of Carol Lynn Esposito and Carol Edmead, both second year students, who were chosen in early July to represent Brooklyn Law School.

The case involved in this year's competition revolved around a computer which erroneously sent detailed financial information to a government agency. This error resulted in loss of profits and emotional distress to the team's "client."

The first round of the competition required the team to argue the defendant's side, although their brief was in favor of the plaintiff. "We knew the case so well, yet it was extremely difficult to anticipate their arguments," said Esposito.

The issues involved in the case are current and very controversial and the bench was "hot." Esposito stated, "the judges were very much into the problem. There was a lot of interaction, a lot of questioning." According to Esposito and Edmead, this aspect of the competition made it a very rewarding experience. "We learned to use our adversary skills, [and] especially how to use rebuttal time," said Esposito. She added that the preparation of a detailed brief was a great challenge and learning experience.

## INTRAMURAL

Brooklyn Law School students who are participating in this year's Intramural Moot Court Competition presented their briefs on October 24, 1983.

Fifty second year students are competing for membership in the Moot Court Honor society. The top three contestants will represent Brooklyn Law School in next year's National Moot Court Competition, sponsored by the American Bar Association.

The case in this year's competition revolves around the Solomon Amendment to the Military Selective Service Act, 50 U.S.C. App. 462; and specifically the constitutionality of the Act's prohibition against anyone failing to register for the draft from receiving federal financial aid.

The participants are to present arguments on two issues: 1) whether the Act constitutes a Bill of Attainder in violation of Article I, Section 9, clause 3 of the Constitution, and 2) whether the Act violates the petitioner's fifth amendment privilege against self-incrimination.

The preliminary rounds of the oral competition began October 31 and will end on November 10. For these rounds, the partici-

pants are divided into teams of two. Each team member must argue both sides of one issue.

Sixteen participants (the top eight for each issue) advance to the semi-final round which will be held on November 15 and 17 at 6 P.M. in the Moot Court Room. The top four for each issue advance to the finals, which will be held November 21 at 6 P.M. in the Moot Court Room. There is an award for the best oralist in the final round. Spectators are welcome.

The Moot Court Honor Society will hold an awards dinner directly following the final round at Gage & Tollner for all finalists and invited guests.

## NATIONAL

Brooklyn Law School's National Moot Court Team submitted its brief for the 34th annual National Moot Court Competition on October 17th.

The topic of this year's competition, which is sponsored by the American Bar Association, is securities fraud. Arguments for the regional competition will be held in New York City on November 29 and 30, and final rounds will be held on February 6 through 8.

The BLS team consists of Judith I. Feinberg, '84, Elizabeth A. Mannig, '84, and Andrew I. Schwartz, '84. The team, which was in last year's fall competition of the Moot Court Honor Society, began preparing its brief in early August.

This year's competition concerns an alleged fraud in a transaction to acquire a business property and an attempt on the part of the petitioner to invoke the Racketeer Influenced and Corrupt Organizations Act (RICO), a federal statute directed at organized crime.

Issues in the team's brief include whether the particular investment contract presented in the case can be defined as a "security" within the meaning of the federal securities laws, and whether the case presents sufficient grounds for the application of RICO. Andrew Schwartz said that the case presents a "tremendous over-breadth problem" with respect to RICO.

The hardest part of the preparation for the competition, according to the team members, was the writing of a single brief. The members approached the problem by working individually and then trading criticisms until a coherent style and focus was synthesized. In addition to these difficulties, each participant in the National Moot Court Competition is required to argue both sides of a particular issue for the first round of the competition. The team is now preparing for the regional oral arguments.

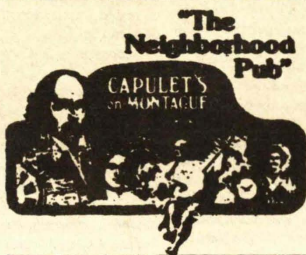
## Psychiatric Service Now Available

Brooklyn Law School has arranged with Dr. Michael Schneck to provide an initial psychiatric consultation for students at no charge. Dr. Schneck is on the faculty of the Department of Psychiatry of the New York University School of Medicine and is Board Certified in Psychiatry. In addition, Dr. Schneck has had substantial experience working with law students and attorneys. Students may contact Dr. Schneck directly and the utmost confidentiality will be maintained. When appropriate, referrals will be made and fees will be charged on a sliding scale basis. Dr. Schneck's office is located in the Faculty Practice Offices at the New York University Medical Center, 530 First Avenue (at 32nd Street), New York, NY 10016. His telephone number is (212) 340-7475.

## Justinian seeks news & feature writers

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# SBA DEBATES GRENADA

By Michael S. Schreiber

Brooklyn Law School's Bar Association held its second meeting of the school year on Wednesday, Nov. 2. The SBA passed a resolution condemning the United States' involvement in Grenada, created a non-voting position to represent first-year part-time day students and appointed a committee to consider amending the SBA Constitution. In other business, the SBA discussed the 1983-84 budget and clinical programs at BLS.

The executive board presented a proposal from Alan Gershowitz, newly elected first-year, part-time day representative. Currently the SBA is organized with delegates representing the various first year sections, the night students, second, and third year students. The first-year, part-time day students are unrepresented in the SBA. On Nov. 1, those students elected Gershowitz to represent them in SBA affairs. Gershowitz's proposal was that the SBA create a voting position in the House of Delegates to rectify this situation.

The first question the SBA directed to Gershowitz was why his constituents were not represented by the first year representatives. Gershowitz's response was twofold. First, part-time, first-year day students do not have the opportunity to vote in first-year elections. Second, Gershowitz said part-time day students have problems distinct from those of first-year and night students.

First-year part-time day students are currently handling their problems "on (their) own" Gershowitz said. "We're handling them will-nilly because we're not in a majority situation." One such problem comes when a professor reschedules a class based on his full-time students' standard class schedule. Another problem said Gershowitz, though "it's a cliché," is "taxation without representation. We pay our activity fee, but have no say in how it's distributed."

The SBA adopted a resolution making Gershowitz a non-voting representative by a unanimous voice vote. Though the

original proposal was to admit a voting representative, Secretary Lisa Heide Gordon and Delegate Warren Levie pointed out that was not possible because the SBA Constitution does not permit amendments except through referenda held in May.

Gershowitz said that he was "very pleased" that the SBA would attempt to amend its constitution so that first-year part-time day students may be represented next year. He said "It stinks that a 'third grade type'

constitution would be in the hands of the SBA."

Gershowitz's charges of impotence led to a general discussion on the merits of the SBA Constitution and the formation of a committee to study the possibility of amending it. During the debate, several delegates said the amending article should just be ignored because it is impractical. SBA President Mary Malet asked what kind of body the SBA would be if it just ignored its constitution. Calling the dissenters "a lynch mob," she said, "If we ignore article XIV, then we can throw out Article XIII, XII, or anything else we find inconvenient." Vice President Mitchell Greebel called out "go for it."

Whereas, we, as law students, recognize that basic principles of international law demand respect for the right of peoples to determine their own future and to resolve their own internal disputes; and

Whereas, the sovereignty and territorial integrity of independent nation-states must be honored if we are to have world peace; and

Whereas, the United States government, by invading Grenada, has violated the sovereignty of that country and ignored all recognized standards of international law, including the Charter of the United Nations, Article 2, sec. 4; and

Whereas, the U.S. invasion of Grenada has further violated Article 15 of the Charter of the Organization of American States, to which both Grenada and the United States belong; and

Whereas, the continued presence of U.S. troops in Grenada violates Article 17 of the O.A.S. Charter; and

Whereas, the invasion has even violated Articles 8, 14 and 15 of the 1981 treaty of the Organization of Eastern Caribbean States, the very treaty which has been pointed to as the legal justification for the invasion, and a treaty to which the U.S. is not even a party,

Therefore, BE IT RESOLVED, that the Student Bar Association of Brooklyn Law School:

- 1) deplores the U.S. invasion of Grenada as a brutal, criminal act which violates all norms of international law and all standards of human decency;
- 2) further deplores the murder of innocent Grenadian civilians by the U.S. invasion forces, including the inexcusable bombing of the Richmond Hill mental hospital and the consequent death of many civilian patients;
- 3) condemns the restrictions imposed on U.S. press coverage of the invasion, restrictions which, intentionally or otherwise, prevent the people of the United States from receiving information about the events in Grenada;
- 4) demands the immediate and unconditional withdrawal of all U.S. military personnel, equipment and supplies from Grenada; and
- 5) further demands that the U.S. government discontinue the use of gun-boat diplomacy to intimidate and coerce the people of the Caribbean and Central America.

Be it further resolved that copies of this resolution be forwarded to President Reagan and Senators Moynihan and D'Amato.

Nov. 21, 1983 • JUSTINIAN • 5

The SBA next passed a resolution, proposed by Delegate John Sokolow, condemning the United States' recent invasion of Grenada (see text of resolution in box). The resolution passed by a vote of 11 for, 10 against, and 4 abstaining, after a heated and disorganized debate.

Controversy centered around two issues, whether the invasion actually violated international and whether the SBA has power to pass such resolutions. The latter question was answered quickly. Malet said, "there are precedents. We have taken such action in the past."

The SBA then dealt with the primary issue: whether it actually condemned the invasion. Several delegates asked if the invasion was really illegal. Stuart Diamond asked whether the legality of the invasion was actually debatable and therefore an issue the SBA should not decide.

Sokolow responded by reading from the Charter of the United Nations, at Article 2 sec. 4, which reads "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." He also read from the Charter of the Organization of American States at Article 15 which provides: "No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state;" and Article 17 which states that: "the territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of any other measures of force taken by another state, directly or indirectly, on any grounds whatever." Both Grenada and the United States are signatories to these two treaties.

Sokolow asked, "is there a reasonable construction, that a reasonably prudent person could make" of these treaties which would validate the United States' action? He said the purpose of the resolution is to show "we don't appreciate the United States violating international law in our name."

Delegate Bernie Graham suggested that the SBA should merely condemn the invasion without addressing the legal issues "because not all of us are familiar with international

Continued on page 15

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# VISITING PROFESSORS INTRODUCE CONTORTS

By Nina L. Sturgeon

On Wednesday, October 26, BLS continued its Distinguished Visiting Scholars Program by presenting Professors Marc Feldman and Jay Feinman of Rutgers Law School-Camden. The professors spoke first at a faculty luncheon, outlining their experimental course in "Contorts," and then participated in a roundtable discussion with students in the third-floor lounge. The main thrusts of their presentations were the necessity of new and innovative teaching methods to better prepare students for real-life law practice, and the reallocation of both student and professorial responsibility for more effective and efficient legal education.

Contorts, first taught at Rutgers-Camden in 1982, is an experimental course combining the first year law study of Contracts, Torts, and Legal Research and Writing to provide an integrated approach to legal doctrine and legal skills in the first semester of law school. The course, through both classroom and non-classroom learning, emphasizes competency in the basic skills of case and statute analysis and legal argumentation; mastery of the doctrinal content of Contracts and Torts; experience with the use of the law library and other research resources; analysis of the structure and social operation of legal reasoning and legal doctrine; and consideration of the historical and philosophical basis of contemporary law.

In their attempt to break down the traditional hierarchy of the legal classroom, Feldman and Feinman utilized many different methods such as team-teaching, mastery level exams, and a strong emphasis on collaborative learning. This last goal was largely accomplished through the use of upper-level teaching assistants, who provided a supportive setting for small-group learning. Teaching assistants provided peer evaluation for students and information about students' performance for the professors, and also helped identify students in need of special attention.

Feldman and Feinman's unconventional approach was epitomized in their address to the first meeting of their Contorts class: "It will never be our intention, either in calling on a student or engaging in discussion or in any aspect of this course, to be unkind, to humiliate, to make you feel foolish or stupid. We categorically reject any aspect of terroristic teaching as a way to motivate you."

Feldman and Feinman's basic proposition is that it is possible to educate students to achieve a much higher level of performance than is normally expected. In addition to innovative teaching methods, they suggest a rethinking of traditional notions of student and professorial responsibility. "To say that we have (the bottom half of the class filled with) bad students who just don't want to do any better is totally shifting the responsibility for teaching onto the student... If they (students) didn't learn it, we (faculty) didn't teach it."

While much student initiative is stressed, Feldman and Feinman actually encourage a symbiotic relationship between students and professors. "Professors should say to students, 'Yes, it's *your* responsibility to learn, but it's *our* responsibility to show you different methods of learning and to support and encourage you in your efforts.' They also advocate a different approach to the Socratic method. "The Socratic method doesn't work because students don't understand what their part of the game is supposed to be. Instead of cultivating omnipotent professorial and powerless student roles, "try putting students in the role of a novice lawyer, where the professor is not completely in charge of the classroom. Students will then be unable to stay in their traditionally passive role and will be forced to take self-responsibility for their learning."

They say this is a radical approach not only because it suggests that students can learn on their own but for a different reason as well. Traditional teaching methods are not only

ing too much responsibility on students (i.e. professors foster the notion to 'do anything you want all semester, just show up for my exam'). Here, we are asking students to "hold professors more accountable for what they do." Students should demand feedback from professors, communicate when certain materials have not been understood, and request that professors check over student outlines and answers to practice exams. "This would counteract the uneasy feeling, common to many students, of going through the entire semester with only a vague sense of whether or not they are getting "it," whatever "it" happens to be."

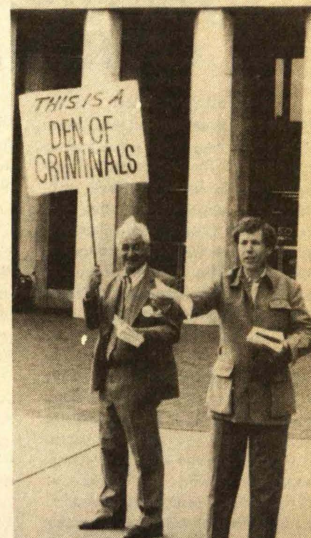
Feldman and Feinman's ideal "good lawyer" would incorporate four basic qualities to better enable her to deal with the fast changing era we live in. Most necessary is the ability to use doctrine creatively. When faced with an entirely new legal problem (such as the recently discovered DES liability), it is essential that a lawyer be able to make creative use of the existing doctrine in behalf of her clients' best interests. More than a "mechanical proficiency" is required, however. "Competency contemplates both the ordinary and the unusual."

Secondly, basic lawyering skills such as

mastering the legal vocabulary, specific legal analysis, and the ability to make a legal argument are required. Students should be shown how "each theory and doctrine of law embody a certain way of thinking about the world, reflected in recurrent styles of legal argumentation."

The third essential quality is the development of the ethic of continual learning and improvement. Information imparted to us as law students will often be quickly out of date. Consequently, throughout law school and life, we should be acquiring ways of learning and qualities of judgement which will permit us to constantly reeducate ourselves.

The fourth fundamental element of a competent lawyer is a willingness to take responsibility, both professional and as moral human beings. "The rhetoric, the language of law often disguises and mystifies the fact that law is a forum of conflicting values. The major device for this mystification is a mode of legal reasoning predicated on the notion that the legitimacy of legal authority and judicial power flow from the non-arbitrary, impersonal nature of its exercise." We are asked to explore the validity of this claim. We are also asked to question the model of professional behavior presented to us; one which is "commonly defined and practised as devoid of almost all intensities." Feldman and Feinman suggest that we as law students "unlearn the professional lesson of leaving our sense of passion at the classroom door," and always be "thoughtful, critical, feeling human beings."



Andrew Melechinsky (carrying sign) and David Edgerton bring their Libertarian message to BLS. Melechinsky, jailed 31 times for contempt of court, disorderly conduct, and tax evasion, plans to picket 173 law schools asserting that students are taught to subvert the Constitution. Payment of income tax, he claims, is purely voluntary; incarceration without a jury verdict is unconstitutional. BLS was his 53rd stop.

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# SBA ADOPTS BUDGET

The Justinian wishes to congratulate the following new members of the Moot Court Honor Society who competed in the Second Year Competition:

Bridget Asaro  
Beil Berger  
Steven Brown  
Eleni Coffinas  
Sally Conner  
Pat Conti  
Cindy Cooperman  
John Costa  
Bill Coury  
Jeannette Diaz  
Joseph Dunne  
Amy Fisch  
Pamela Fried  
James Glasser  
Richard Goldstein  
Stefanie Honig  
Kenneth Klein  
Steve Landy  
Richard Lepowsky  
Alan Levin  
Marjorie Levine  
Jeffrey Levitt  
Joseph Martini  
Susan Mendelson  
Janis Miglione  
Elizabeth Orfan  
Joseph Pickard  
Scott Pollock  
Joy Schechter  
Elissa Settecase  
Stuart Silberg  
David Silva  
Stanley Simon  
Jay Sloane  
Janet Sobel  
Brian Sokoloff  
Richard Speirs  
Harry Steinberg  
Stephen Volkheimer  
David Wilde  
Ken Zeilberger  
Joseph Zepf

By Michael S. Schreiber

At an emergency meeting held on November 10, 1983, the Brooklyn Law School Student Bar Association adopted a budget for the 1983-84 academic year by a vote of 20 in favor and 1 against. The budget was adopted over the protests of representatives from two student organizations which felt that they had not received large enough allocations in the recommendation from the budget committee.

The emergency meeting had been called at a regularly scheduled SBA meeting on November 2, 1983. At that meeting SBA Treasurer Lance Dandridge reported that the BLS Administration had finally granted the budget to the SBA and that hearing on requests from student organizations would receive funds as soon as possible. The SBA normally meets only once a month.

The meeting began with President Mary Mahelt proposing that the Budget Committee's recommendation be accepted "as is." In discussing the proposal, the SBA heard from representatives of the Natural Resources Law Society (NRLS) and the New York State Bar Association Law Student Division (NYSBA/LSD) who claimed their organizations should receive larger allocations than were recommended.

Sarah Thomas Gonzalez, speaking for the NRLS, which she said was "the only student activities group publishing legal research by students," asked the SBA to increase its allocation from the \$300 recommended by the committee to the \$850 requested, or "at least the \$500 we received last year." Gonzalez also presented the SBA with a petition signed by approximately 75 BLS students.

The money NRLS wanted was to pay for speaker's honoraria, printing, xeroxing, postage and refreshments. Last year's speakers agreed to speak for free, explained Gonzalez, and printing costs were donated. Printing costs will be donated again this year she said. He did not say whether the speakers who have committed themselves to come this year have been promised honoraria.

Dandridge explained to the SBA that the allocation was based on each organization's request and on its track record. The NRLS received \$500 last year but only spent \$156. "Obviously we would like to give every group everything they asked for, but there's not

enough money to do that."

Christine Kicinski represented the NYSBA/LSD. She said that the NYSBA/LSD's executive committee was half comprised of BLS students and that the \$400 recommended by the budget committee was not enough. Almost all of the \$1000 NYSBA/LSD requested was for traveling expenses for members to attend meetings around the state.

John Sokolow, a member of the budget committee, explained why the allocation was frozen at last year's level. He said there was no relationship between the membership and the people attending the meetings. "Accountability just doesn't exist, there are no elections for representatives like the ABA/LSD and they don't report back to the members or anyone else," Dandridge said "we didn't see how these people could claim to be representatives."

Kicinski responded to Sokolow's charges by admitting "I have been remiss, but there is nothing yet to report, we are a brand new law student organization."

Sokolow also pointed out that last year's financial records for this group were withheld by last year's chairperson.

Connie Spirio, another budget committee member, charged that NYSBA/LSD had ad-

mitted at budget hearings that their travel expense request was "off the wall." Other expenses, such as phone, xeroxing, and postage are charged to the SBA, according to Dandridge.

Delegate Bernie Graham pointed out that last spring the NYSBA/LSD had requested \$150 for three members to attend a formal dinner, and that that request had been rejected by the SBA. Kicinski said they had requested those funds again this year.

The budget was passed in record time. The roll call vote was finished one hour after the meeting began. No amendments were made to the committee's recommendation. Dandridge said that if a group spends its allocation it is free to make a supplemental request at a later date.

Herb Marak, the only delegate to vote against adopting the recommended budget, said he opposed it because the SBA was given almost no information on how the money was to be spent by the individual groups. Dandridge said that "there wasn't time to put together the kind of detailed information the committee would have liked to hand out. We were prepared to answer any questions, but we thought it was important to get money to the student groups as soon as possible."

**Can the government withhold financial aid from a student who refuses to register for the draft?**

**8 Moot Court finalists will argue their positions in front of:**

**JUDGE T. KUPFERMAN**  
*Chief Judge, A.D. 1st Dept.*

**JUDGE G. PRATT**  
*2nd Circuit Ct. of Appeals*

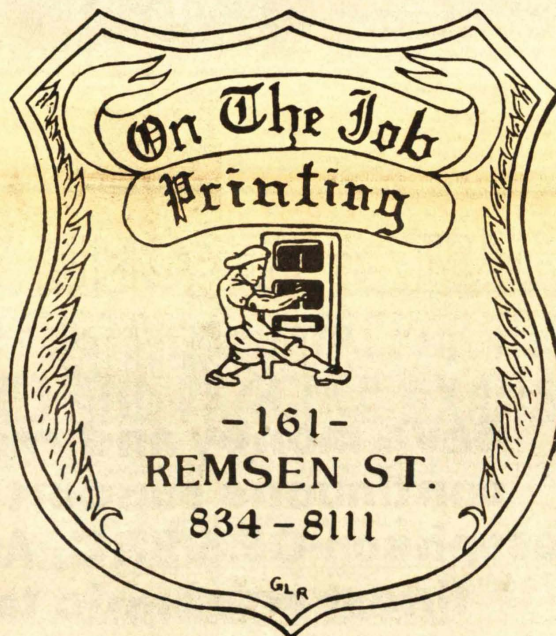
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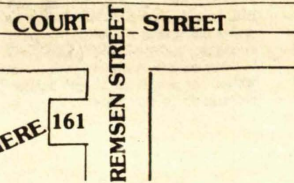
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# CAFETERIA CONCESSION CONSIDERED

By Jonathan A. Murphy

Brooklyn Law School's contract with Food Concepts, Inc., the present food service, is up for renewal in January of 1984. Robin H. Siskin, Director of Student Services, said the administration is soliciting bids from other food services as well as from Food Concepts, Inc. She said that inviting bids from other food services is standard procedure that has been followed in the past, and does not reflect any discontent with Food Concepts, Inc. Discussions with Siskin, Mitch Greebel, the Vice-president of the Student Bar Association, Andy Moschetta and Quentin Mercer, executives of Food Concepts, Inc., and students have revealed various opinions about the present service, the possibility of selecting a new service, and the importance of student participation in any decisions involving possible changes to services offered to the student body.

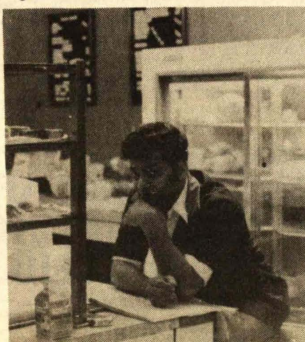
Siskin said that the present contract does not include any exchange of money between the food service and BLS. Previous bidders were required to submit proposals which stipulated the extent of services they would provide, varieties of foods that would be offered, and prices. Food Concepts, Inc. operates solely on a "profit and loss" basis, has been at BLS for six years, and designed and built the steam line that comprises the cafeteria at BLS. Siskin said that the school will own the cafeteria equipment by the time the contract expires this January.

Siskin did suggest some alternatives to the present arrangement which might be considered in any new contract signed. One possibility is to have the cafeteria subsidized by the school, perhaps resulting in lower prices for some food items. Another alternative would be to have the food service pay rent for the cafeteria space, or an arrangement where the service pays a fixed percentage of its profits to the school; these alternatives might result in increased prices for some items on the menu.

Siskin is considering the possibility of

taking on a new food service, but she has not precluded the possibility of renewing the contract with Food Concepts, Inc. She has been investigating other companies and the range of services which they can offer to BLS. She attended a conference in New England where she was able to talk with representatives from other companies, and she has also been testing the quality of food that some of these services have to offer. Since her contracts with these other food services are preliminary, she decline to name them.

One difficulty with the facilities at BLS is a lack of ventilation equipment. Siskin said that any facilities lacking ventilation are prohibited by law from cooking with fat or grease. This limits the types of food that can be offered in the cafeteria, and it also limits the number of companies willing to work with the facilities. She said the cost of installing ventilation in the cafeteria was "prohibitively high."



Mitch Greebel, Vice-president of the SBA, demonstrated a concern with the possibility of any changes which might occur in the food service offered to the student body. He feels that students should have a voice in any decisions made. Siskin also felt that "if it affects

the students, they should have a say." Greebel has voiced his concern to Siskin, and both agreed that a committee partly comprised of students is an important consideration. It is not clear to what extent students would affect any decisions, but their role is considered important by Siskin and Greebel because any decisions concerning changes in the food service directly affect the student body more than any other segment of the law school community.

Greebel said that the warmth and friendliness of the staff in the cafeteria was important and that it is also nice to have the food management here be a part of the BLS community. He also pointed out how well liked Vinnie and Jimmy are by the student body, and that a change in the food service would bring in different people.

An interview with Andy Moschetta, the Area Manager of Food Concepts, Inc., and the company's supervisor of this area, Quentin Mercer, exposed some interesting attitudes about the present contract. Moschetta said that Food Concepts, Inc. is a large international company with over 250 food service contracts. He was unaware that BLS was considering actively soliciting bids from competitors, and pointed out the concern of the company over the possibility of losing the contract. He felt that the company's six years with BLS have been good ones, and that Food Concepts, Inc. is eager to provide the type of service and kinds of food that the student body wants. He suggested that the students might want to form an independent committee which could voice the students' suggestions and complaints directly to him, and emphasized how able and willing the company was to adapt to the wants and needs of the BLS community. Mercer added that this suggestion was especially open to night students, who have little time to eat between work and classes and are an important part of the company's business.

Informal conversations with members of

## SBA BOOK CO-OP

By David Niebauer

The Student Bar Association bookstore, located in the SBA office, room 403, is a student operated book co-op. The bookstore offers required texts and study aids to the Brooklyn Law school student body. The SBA bookstore accepts all law related books on a consignment basis. Books are sold for one-half of their list price and checks are mailed to consignee one month after sale. The bookstore charges a \$1 service fee for each book sold.

Account records for the 1982-83 school year show a net gain of \$71.08. This figure is the difference between a yearly income figure of \$2,206.78 and an expense figure of \$2,135.70. Since the bookstore does not have a separate budget, overhead costs are absorbed by the SBA general fund.

Beginning this year, the SBA bookstore will acquire all books left in student lockers over the summer. Due to this new acquisition source, records for the 1983-84 school year promise to show a substantial gain. SBA Treasurer Lance Dandridge projects that the net gain will triple in the year to come.

Dandridge also said that "the bookstore hours will increase now that new members have been elected to the SBA." Books for the second semester are currently on sale.

the student body have revealed the following views regarding the present service. Marla Bloch, a first year student who has worked as a part-time administrator for the food service at Columbia University, feels that the main items on the menu were priced fairly but the beverages, cookies and general "munchies" are overpriced. Mary Malet, President of the SBA, feels that the prices are cheaper in the cafeteria than just about anywhere else in the city, and that the food is always fresh. Andy Siegal, another first year student, said he gave the food service a "thumbs down." And Eric Altman, another first year student, said he's been meaning to get around to it, but he "hasn't even tried the food here yet."

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# MERIT SCHOLARSHIPS

Continued from page 1

The third paragraph reads in part:

Promising students who satisfy the requirements of the Merit Scholarship Program will automatically receive scholarships totalling no less than one-third of the tuition charged for the 1984-1985 academic year.

Professor Gilbride expressed reservations about the use of the word "automatically" in the notice. Dean Trager sought to clarify the hastily-drawn letter by explaining that the scholarship is tied to the Early Decision Plan requiring qualified applicants to file by February 1, 1984 and to make a firm commitment to BLS with a deposit "substantially" in excess of the usual \$100. However, an apparently contradictory statement in the letter states that "[c]andidates who submit their application for admission before April 1, 1984 will be eligible for consideration." April 1 is the regular deadline for applications. Trager explained that the school is "required" to list an April 1 deadline in application materials.

Aside from the grade-point average, LSAT score, and early decision, it was not made clear what additional factors would constitute "requirements" of the program or how soon they might be determined.

## Tuition Disparity

It is estimated that the disparity in tuition between those receiving the program's benefits and the "lower" 75 percent of the school would be between \$2,200 and \$2,400 a year based on a hypothetical 10 percent tuition increase for 1984-1985.

[On Tuesday, Trager reiterated his promise that there is "no way" that tuition would rise more than 10 percent for the next academic year.]

A typical non-scholarship first or second year student might expect to pay as much as \$7,260 for 1984-1985 tuition (based on current first year tuition of \$6,600 plus the maximum 10 percent increase) while the Merit Scholar would pay \$4,864 (one-third off).

Working from the hypothesis that all students in the top quartile of an incoming class of 300 might, in fact, qualify for the Merit Scholarships, Trager admitted that an additional \$200,000 would be needed, bringing the total scholarship corpus to over half a million dollars.

"If this program has the effect to double the size of the group whose credentials it seeks," said the Dean, "it will have done a great service to the school, and we'd find the money somehow." Observing that tuition increases



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## THE MERIT SCHOLARSHIP PROGRAM

The 1983 Entering Class was one of the most carefully selected and distinguished first-year classes ever to enroll at Brooklyn Law School. Measured against previous classes, these students compiled the highest median undergraduate grade-point average in the Law School's history. Their collective performance on the Law School Admission Test was the best achieved by any of our entering classes during the past eight years. Coming to us from twenty states, they were the most geographically diverse group ever to be admitted into the School. In sum, they represent a demonstration of Brooklyn Law School's uncompromising commitment to establish itself as a law school of the first order.

Our present goal is to enhance these elements in our next entering class and, in the process, heighten the prestige of the student body and the institution as a whole. To help accomplish this, the Law School has established the Merit Scholarship Program. This Program is generally available to those admission applicants whose academic credentials would place them in the upper quartile of the entering class. The Merit Scholarship Program offers substantial scholarships and the availability of early admission decisions.

## Merit Scholarships

Promising students who satisfy the requirements of the Merit Scholarship Program will automatically receive scholarships totaling no less than one-third of the tuition charged for the 1984-1985 academic year. The awards are based entirely on academic merit; financial need, therefore, is not a consideration. Candidates who submit their applications for admission before April 1, 1984 will be eligible for consideration.

## Early Decision Plan

Candidates who qualify for the Merit Scholarship Program may request an Early Decision on their applications for admission to the Law School. The Early Decision Plan is available to applicants who, after critically considering various law school options, have decided firmly that Brooklyn Law School is their first choice. Applicants participating in this Plan will be notified of the School's decision no later than the end of February. To receive an Early Decision on admission, the application and supporting documents for the Program must be submitted to the School by February 1, 1984.

Admission candidates interested in learning more about Brooklyn Law School's Merit Scholarship Program should contact our Assistant Dean for Admissions in writing or by telephoning (212) 780-7906.

alone could not possibly pay for the Merit Scholarship Program, Trager did not rule out the possibility of reducing anticipated faculty raises as another source of revenue.

## Rising Tide

Responding to a claim that the majority of students might feel that they are unjustifiably subsidizing an intellectual elite who will have little trouble making it through law school and landing prestigious positions anyway, Trager said, "There will be some perception of inequity. The alternative is stagnation. Part of my program is to make this the best regional law school and we have to be prepared to pay the price. This inures to everyone's benefit. A student at the bottom of the Harvard class still gets the benefit of a Harvard reputation whether she or he deserves it or not. When I went to law school, NYU was second-rate; now all

NYU graduates are reaping the benefits of its enhanced reputation, even those who graduated before it was considered top-notch. BLS now is a better school than NYU was then."

Other development plans include the institution of an in-house Federal Litigation Clinic, which is "four or five times more expensive than regular placement clinics," a Continuing Education Program run by and for alumni, and a vigorous campaign by the new Alumni Director, Johanna Gurland, and Administrative Assistant Wendy Lyons to reestablish bonds with the 12,000 living BLS alumni whose aid is seen as essential to the vitality of the law school.

These aggressive and admittedly expensive programs are viewed by Trager as a rising tide in Brooklyn's life. He whimsically observed, "A rising tide lifts all boats."

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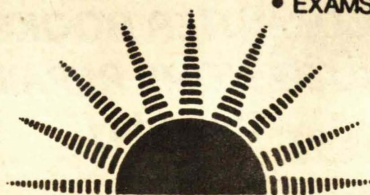
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# INSIDER TRADING...

The Justinian, Vol. 1983 (1983), Iss. 6, Art. 1

Continued from page 3

10(b); comparisons with other provisions of the 1933 and 1934 Acts; and through application of the policies underlying Rule 10b-5. A leading commentator on the Rule has found eight such policies: "maintaining free securities markets; equalizing access to information; insuring equal bargaining strength; providing for disclosure; protecting investors; assuring fairness; building investor confidence; and deterring violations while compensating victims." A court's emphasis of a particular policy influences not only the elements of the cause of action, but also the remedies and defenses available.<sup>20</sup>

Rule 10b-5 prohibits misrepresentations, half truths, and non-disclosures or omissions of material facts, thus adopting the so-called "minority view" of the common law. By their terms, Section 10(b) and the Rule apply to manipulations<sup>21</sup> and deceptions "in connection with purchase or sale of any security," thus allowing nonshareholder purchasers to bring suit, unlike cases under the common law. The issue of whether scienter had to be proven was a much litigated question until the Supreme Court resolved it by requiring some proof of scienter in private causes of action<sup>22</sup> and actions brought by the SEC.<sup>23</sup> The court looked to the statutory language of Section 10(b), and to the use of the words "manipulative or deceptive" to find Congressional intent to require scienter.<sup>24</sup> The Court refused to define the concept, leaving lower courts to adopt varying standards.

The concepts of privity, reliance and causation in Rule 10b-5 have caused both confusion and disagreement. Courts have divided not only on the definitions of the terms, but also on their applicability to Rule 10b-5. Problems emerge particularly in transactions on the exchanges. Such transitions involve difficult problems of proving that a particular buyer or seller can be matched. Although some view the requirement of privity as "all

but vanished from 10b-5 proceedings," courts continue to consider it a factor in determining causation. Under the common law, there must be a causal connection between the wrongful conduct and the damage, and the misrepresentation must have influenced the party by his reliance on it. Thus, causation can be viewed as consisting of two elements: (1) loss causation involving economic harm, and, (2) transaction causation which occurs when the violation causes the party to engage in the transaction. Two cases demonstrate the divergent views regarding the requirement of causation in trading on the exchange. In



Prof. Arthur R. Pinto

*Shapiro v. Merrill Lynch*,<sup>25</sup> the Second Circuit found a nontrading tipper and tippee liable for damages as a result of trading on nonpublic information.<sup>26</sup> The court indicated that plaintiffs need not actually have purchased from the defendants, thereby doing away with the privity requirement. Furthermore, the court held that plaintiffs need not prove reliance or causation in a nondisclosure case since the materiality of the omission creates causation in fact. The court indicated that Rule 10b-5 requires one in possession of inside informa-

tion to either disclose or abstain from trading.<sup>27</sup> Thus, the Rule is violated when one trades without disclosure. In *Friedrich v. Bradford*,<sup>28</sup> the Sixth Circuit took a contrary view when a trading tippee was sued for private damages. Although the court did not appear to require privity in all cases, causation was found to be lacking. The court indicated that disclosure or abstention from trading are alternative duties, and that although the act of trading violated Rule 10b-5, it did not affect plaintiff's actions or cause loss.<sup>29</sup> The underlying concern of *Friedrich* was the potential for "punitive damages almost unlimited in their potential scope."<sup>30</sup> Resolution of the causation issue will have great impact on private causes of action.

Once a director is found to have violated Rule 10b-5 by either trading on inside information or tipping the information, he is subject to several sanctions. The SEC can seek an injunction,<sup>31</sup> criminal sanctions,<sup>32</sup> or damages for the company or potentially injured investors.<sup>33</sup> If the director is a party subject to regulation by the SEC, he may be disciplined or even suspended from practice before the Commission.<sup>34</sup> Of all these sanctions, however, it is the private cause of action which can create "Draconian liability." Courts have not agreed upon either the scope or measure of damages, leaving directors who violate Rule 10b-5 with little assurance of their potential liability.

## 2. Section 17

As indicated previously, Section 17 of the 1933 Act, which prohibits fraud in the offer or sale of securities, served as the model to Rule 10b-5. Many early decisions involving Rule 10b-5 also involved an action under Section 17, but little case law developed as compared to Rule 10b-5. Because recent Supreme Court decisions have cut back on Rule 10b-5,<sup>35</sup> commentators have given more attention to Section 17, and have viewed it as a potential supplement to Rule 10b-5 actions.<sup>36</sup> This impetus will be furthered by the Supreme Court's decision in *Aaron v. SEC*,<sup>37</sup> which held that scienter is required for an SEC injunction under Rule 10b-5 and Section 17a(1), but not under Section 17a(2) and 17a(3).<sup>38</sup> Thus, with respect to SEC enforce-

ment actions, Section 17 will gain in importance.<sup>39</sup> Whether there is an implied private cause of action under this Section, however, remains unsettled with circuits splitting on this question. Given the Supreme Court's reluctance to imply new private rights of action and the regulatory scheme of the 1933 Act, such an action is unlikely to be implied.

## 3. Williams Act

In 1968, Congress amended the 1934 Act with the Williams Act<sup>40</sup> which was intended to regulate tender offers. One of the purposes behind the Act was to provide the shareholders of the tender offeree corporation with full disclosure of information from which they could decide whether to accept the tender. Section 14(e) of the 1934 Act is an antifraud provision modeled after Rule 10b-5 and applicable to any offerors and the offeree.<sup>41</sup> Under recently enacted Rule 14(3)-3,<sup>42</sup> promulgated pursuant to Section 14(e) in partial response to the Supreme Court's reversal of *Chiarella v. U.S.*,<sup>43</sup> transactions in securities based upon material nonpublic information relating to a tender offer would be violative of Section 14(e).<sup>44</sup> Thus, directors of either the tender offeror or offeree would be liable for tipping or purchasing the securities of the offeree if they know of a pending takeover while the information is nonpublic.

## 4. Exchange Self-Regulation

The 1934 Act provides for SEC registration of stock exchanges<sup>45</sup> and associations of securities dealers,<sup>46</sup> and authorize them to promulgate rules.<sup>46</sup> Both regulate their members and are concerned with the use of inside information by directors. In addition, their encouragement of timely disclosure encourages the flow of information to the market and contributes to an orderly market. The exchanges also are actively involved in market surveillance which aids in the detection and enforcement of anti-insider trading rules. Violation of the rules can lead to a delisting of the corporation from the exchanges, suspension of a member, or action by the SEC.

Continued on page 11

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# INSIDER TRADING...

Continued from page 10

## 5. Evaluation

The doctrines which restrict the use of inside information are not without their critics.<sup>48</sup> It remains unclear what real effect the law has had since insider activity continues, with heavy trading often preceding public announcements of corporate news. Economists have called into question much of federal securities law as not being "cost-effective,"<sup>49</sup> and the Supreme Court has even expressed its concern that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."<sup>50</sup>

Professor Henry Manne, a leading critic of insider trading restrictions, has argued that insider activity should not be restricted. He argues that no one is harmed by the trading since the long-term investor, as opposed as speculators, will not trade on the gradual price changes of inside trading. If anything, the trading influences the price of stock in right direction adding to market efficiency. Furthermore, insider trading is justified as compensation to the entrepreneurs of an enterprise. Nevertheless, these economic analyses are not without their critics.<sup>51</sup> Other normative concepts such as fairness and the protection of investors have values, and are difficult to measure. The honest market has flourished for almost fifty years and the perception of that market by investors should not be underestimated.

## FOOTNOTES:

1. 15 U.S.C. §§ 77a-77aa (1976).
2. 15 U.S.C. §§ 78a-78kk (1976).
3. Section 4 of the 1934 Act, U.S.C. § 78d (1976).
4. "An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." K. Davis, *Administrative Law*. Text § 1.01 at 1 (1959).
5. The SEC is given general power to pro-

mulgate rules and regulations necessary to effectuate a given act. E.g., § 19 of the 1934 Act, 15 U.S.C. § 785(b) (1976).

6. See, e.g., § 10b of the 1934 Act, 15 U.S.C. § 78j(b) (1976). The concept of disclosure as a deterrent has been attributed to a statement in Louis Brandeis, *Other Peoples Money* (1914), that "[S]unlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.* at 62.

7. Section 16 of the 1934 Act, 15 U.S.C. § 78p (1976).

8. Section 17 of the 1934 Act, 15 U.S.C. § 77q (1976), § 10 of the 1934 Act, 15 U.S.C. § 78j (1976); 17 C.F.R. § 240.10b-5 (1980).

9. 17 C.F.R. § 240.10b-5 (1980).

It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud
- (b) To make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or location of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

*Id.* Proposed Code § 1603 codifies Rule 10b-5 as to insider trading.

10. 15 U.S.C. § 78j (1976).
11. 15 U.S.C. § 77q (1976).
12. Fratt v. Robinson, 203 F.2d 627-31 (9th Cir. 1953). One of the draftsmen of the 1934 Act described Section 10(b) as "a catch-all to prevent manipulative devices." *Hearings on Stock Exchange Regulations Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (Thomas G. Corcoran).
13. According to the SEC in *In Re Cady*

Roberts & Co., 40 S.E.C. 907, 912 (1961): We believe that the anti-fraud provisions are phrased in terms of 'any person' and that a special obligation has been traditionally required of corporate insiders, e.g., officers, directors and controlling stockholders. These three groups, however, do not exhaust the classes of persons upon whom there is such an obligation. Analytically, the obligation rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications. Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities. Intimacy demands restraint less the uninformed be exploited.

*Id.* Cady has been cited approvingly by the courts. E.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (1968), cert. denied sub nom. Kline v. SEC, 394 U.S. 976 (1968), cert. denied, 404 U.S. 1005 (1971).

14. E.G., Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, cert. denied, 404 U.S. 1004; cert. denied sub nom. Reynolds v. Texas Gulf Sulphur Co., 405 U.S. 978 (1971).

15. Jurisdiction under § 10 of the 1934 Act, 15 U.S.C. § 78j(b) (1976), is based upon "the use of any means of instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange." *Id.* Courts have given this jurisdictional requirement an expansive interpretation. E.g., Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

16. Fratt v. Robinson, 203 F.2d 627, 6 (9th Cir. 1953).

17. Section 21 of the 1934 Act, 15 U.S.C. § 78j (1976).

18. 69 F. Supp. 512 (E.D. Pa. 1946). Three doctrines have usually supported an implied

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right of action:

- (1) common law tort principles permit suit by a person injured by a breach of a criminal statute;
- (2) Section 29(b) of the Exchange Act, which voids contracts in violation of 10b-5, necessarily suggests that a remedy exists; and
- (3) the purpose of the Exchange Act to make protection of the public reasonably effective justifies relief.

A. Jacobs, *supra* note 26, § 8.02, at 1-160.

19. In *Superintendent of Ins. v. Bankers Life & Cas. Co.* 404 U.S. 6 (1971), the Supreme Court recognized a private right of action in a footnote. *Id.* at 31 n. 9.

20. For example, if an investor, such as a tippee, is suing, he may be subject to the defense of *in pari delicto* ("equal fault"), if he participated in the fraud. *Ruder Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 660-62 (1972).

Whether the court will allow the defense of *in pari delicto* in the context of securities law, seems to rest on either of two policies: "One is that deceptive and manipulative practices should be deferred. The other is that members of the investing public should be able to recover when wronged." *Ruder, supra* at 660.

21. Manipulation is "a term of art when used in connection with securities markets. It connotes intention or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

22. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

23. SEC v. Aaron, 446 U.S. 680 (1980) (scienter required in action for injunction). Proposed Code § 1602(a) does away with the requirement of scienter in actions for injunctions.

24. Although subsections (2) & (3) of Rule 10b-5 indicate that negligence is sufficient, the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) indicated that Rule 10b-5 must be viewed consistently with Section 10(b) which uses the term "manipulative or deceptive" in conjunction with "device or contrivance," suggesting

Continued on page 13

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# KINOY...

Continued from page 3

of Michigan was punctuated by his reference to Governor Huey Long of Louisiana who once said, "When fascism comes to America it will come wrapped in the American flag." Kinoy, in his recently published book, said, "It dawned on me that the Nixon administration was seeking to wrap its plan for governmental lawlessness in a mantle of legality. As was to be the 'American' way—not the foreign path via the coup d'état." The plan, whose architect was then Assistant Attorney General William French Smith, failed. Not even the Nixon Court could fail to see the threat to our basic constitutional structure which would come from the vesting of such power in the Executive Branch.

Kinoy followed two strategies in developing his Supreme Court argument. First, he utilized legal scholarship. With the help of his students at Rutgers, he researched constitutional history from the articles of Confederation to the debates of the Constitutional Congress, to demonstrate the clear intent of the Founders to limit the potentially repressive powers of the Executive and to ensure the people's right to be protected from repressive governmental machinery. Kinoy shared the role of co-counsel with William Gossett, a corporate lawyer and former A.B.A. President was general counsel to the Ford Motor Company at the time he was called to represent Damon Keith, the District Court judge. Together, Kinoy and Gossett, who were of entirely different political persuasions, agreed that Nixon's attempt to suspend the Constitution was a move unprecedented in America's history and unequivocally destructive to constitutional democracy.

Second, Kinoy employed what he called the critically important strategy of "telling it like it is," i.e. not being afraid to talk about the political implications of this constitutional challenge. At the oral argument, Kinoy argued that there are real dangers in suspending the Constitution. With the first Watergate revelations still six weeks away, Kinoy argued that if the Fourth Amendment was abridged here, in response to antiwar activists, then the next time the President could, with impunity, wiretap his opposition in the Democratic Party. In fact, according to Kinoy, a high White House official had recently accused the Democrats of having "aided and abetted the nation's enemies" by expressing opposition to the administration's policy in Vietnam. This integration of political and legal arguments proved effective.

Justice Powell, in his opinion, wrote "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies...the price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society."

Six weeks after oral argument, and just one day before the Supreme Court publicly announced its decision, five burglars were arrested at the door of Watergate, the Democratic Party headquarters, holding an enormous amount of electronic surveillance equipment in their hands. Kinoy theorizes that the Watergate burglars were not repairing a faulty tap, as they claimed, but were in fact removing all the surveillance equipment that had already been installed by an overconfident President. Had the case been decided the other way, wiretapping would have been legal. The hasty retreat from Watergate, (they had to get the taps out before the Supreme Court decision became public), probably led to carelessness and the arrests.

According to Kinoy, this was the real crisis of Watergate. It was not that the United States had a corrupt president, who with his appointed henchmen, grasped for political power. Rather it was that the underpinnings of the U.S. Constitution were threatened by those men. He said that Nixon was making a serious threat to the history of the House claim that it had the power to exclude a duly elected

Kinoy also told of the history of the Civil Rights movement, begun some 25 years ago—before the memories of many of today's law students.

Once again placing a Supreme Court decision within its historical context, Kinoy began by analyzing *Brown v. Board of Education* as a response to world opinion about the United States' treatment of its Black citizens. He said the U.S. was facing a serious credibility crisis in its foreign policy. African nations were one-by-one achieving independence. The United States after World War II, in assuming a world leadership position in opposition to the U.S.S.R., proclaimed itself the champion of the rights of minorities. That line was not credible to the new African nations according to Kinoy when Black people within our own country were effectively eliminated from the political process. "We had to look better than that," said Kinoy.

The result was an equivocal decision in *Brown* which proclaimed our commitment to equality and rejected the "separate but equal" doctrine of *Plessy v. Ferguson*, but it declined to seriously challenge White supremacy by not providing any mechanism for enforcement of integration. The necessity for the civil rights movement was apparent, for with no enforcement mechanism, *Brown* could be disregarded with impunity.

In 1955, one year after *Brown v. Board of Education* shook the southern White establishment, Rosa Parks, a Black woman from Montgomery, Alabama, refused to sit at the back of the bus. She was forcibly removed and arrested. This individual act precipitated the Montgomery Bus Boycott where Black people refused to ride the city buses. Out of this economic action, the young Dr. Martin Luther King, Jr. emerged as a leader. Thus it began. Years of civil rights activity culminated in Mississippi Summer, 1964, when students and lawyers from all over the country converged on Mississippi to work alongside Black Mississippians attempting to register to vote. One night at the beginning of the summer, Kinoy received a desperate call. Three young civil rights workers had been missing for hours. A white person had overheard in a local bar that the students had been arrested and that the Klan was planning to steal them away from jail and kill them to teach the civil rights movement a "lesson." At Kinoy's suggestion, a law student called the FBI and the Justice Department and pleaded with them to intervene, but the response was negative: "We don't have the authority to act." One month later, the mutilated bodies of the three students, Chaney, Schwerner and Goodman, were discovered in a hastily built dam. This tragedy and others like it led to national awareness and support for the Black struggle; the challenge of the Southern Democratic Party machine by Fannie Lou Hamer and the Mississippi Freedom Democratic Party; and to a successful lawsuit demanding the immediate appointment of emergency Federal Commissioners in every one of Mississippi's 82 counties in order to enforce federally protected constitutional rights. The legal strategies of those years involved resurrecting many of the radical reconstruction statutes which had been buried since the 19th century.

In 1966, Kinoy received a call from Adam Clayton Powell. A coalition of conservative Republicans and southern Democrats in the House of Representatives were denying him his seat in Congress. Kinoy situated *Powell v. McCormick* squarely within the 12-year-old struggle by Black people for their civil rights. Adam Clayton Powell was a symbol of legitimate political power to Black people throughout the country. Powell, a popular Harlem Representative, had seniority and had assumed the Chair of the powerful House Education and Labor Committee. From this position, he oversaw the enactment of some of the important social welfare legislation to emerge from the Kennedy and Johnson administrations, including the Civil Rights Act of 1964. Many of the abuses of power charged against him were common among White congressmen. The Supreme Court's landmark decision in *Powell v. McCormick* House claim that it had the power to exclude a duly elected



Arthur Kinoy (far right)

representative of the people. Powell stands as an example of the separation of powers doctrine and judicial review. While the casebooks and the opinions on their faces do not give us an idea of the social movements which contributed to the charged atmosphere surrounding the case, Kinoy's speech gave us just such an understanding.

#### Conclusion

Kinoy said that the struggle for freedom and the defense of the Constitution has not ended but continues today as challenges are posed in the same way as in the Nixon era. For example the Reagan administration has moved aggressively to suppress dissent by the new F.B.I. guidelines which allow surveillance of political groups based on a very low standard and by the authorization of the C.I.A. to conduct domestic spying. At the same time Reagan is attempting to dismantle the Legal

Services Corporation, and to undermine the operation of the Commission on Civil Rights. These policies go hand in hand with support for South African apartheid, and the illegal military efforts against Nicaragua. *United States v. United States District Court* was decided slightly over a decade ago, yet today the world seems closer to annihilation than before, since the U.S. government endorses the concept of a limited nuclear war, and continues to develop first-strike weapon systems such as the MX. Kinoy inspires confidence that lawyers and students working with other people, will succeed in protecting those crucial political rights, enumerated in the constitution that are fundamental for a democratic society. For Kinoy the Constitution remains a living document written and for people struggling against those who would destroy political opposition through police power.

# Q

#### PICK THE BEST ANSWER

1. Hal and Winnie, husband and wife, were jointly accused of receiving stolen goods. They consulted Lars, a lawyer, and in the presence of Lars and Lars's secretary, Hal said to Winnie, "Dear, we really did know that these color TV sets were hot. After all, we bought them for \$10 each." At Hal's trial, in a jurisdiction where a criminal defendant cannot prevent his spouse from testifying, Winnie voluntarily took the stand and was asked what Hal said to her in her lawyer's office. On objection by Hal's attorney, the trial judge should

- (A) exclude the question because of the attorney-client privilege.
- (B) exclude the question because of the marital privilege.
- (C) uphold the question and require Winnie to answer.
- (D) exclude the question because of the attorney-client privilege and the marital privilege.

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# INSIDER TRADING

Continued from page 11

- knowing or intentional conduct. *Id.* at 214.  
25. 495 F.2d 228 (2d Cir. 1974).  
26. Subsequent consideration by the district court expanded the class of plaintiffs to include those who traded while the information was non-public, as opposed to simply the period during which there was insider trading. *Shapiro v. Merrill Lynch*, [1976] Fed. Sec. L. Rep. (CCH) P. 95,377 (S.D.N.Y. 590 (1975)).  
27. 495 F.2d at 236.  
28. 542 F.2d 307 (6th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).  
29. The court in effect ignores the corollary duty to disclose when trading on inside information, and it is the breach of that duty which causes loss. The duty to disclose only arises when there is trading. *Rapp, Fridrich v. Bradford and the Scope of Insider Trading Liability Under SEC Rule 10b-5: A Commentary*, 38 Oh. St. L.J. 67, 88-89 (1977).  
30. 542 F.2d at 318-19. In a concurring opinion, Judge Celebrezze attempts to salvage the "disclose or abstain" rule by arguing that the class of plaintiffs entitled to recover should be limited to those who traded contemporaneously with the insider. *Id.* at 327 (Celebrezze, J., concurring). Proposed Code § 1703(b) adopts the Celebrezze approach.  
31. Section 20(b) of the 1933 Act, 15 U.S.C. § 77t (1976); §21(e) of the 1934 Act, 15 U.S.C. § 78u (1976).  
32. § 32(a) of the 1934 Act, 15 U.S.C. § 78f(a) (1976).  
33. In *SEC v. Texas Gulf Sulphur Co.* 446 F.2d 1301 (sd. Cir.), *cert. denied*, 404 U.S. 1005 (1971), the court required defendants to disgorge all profits which would be held by the corporation in escrow for possible claims. *Id.* at 1307.  
34. Rules of Practice, 17 C.F.R. § 201.2(e) (1980).  
35. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).  
36. *Steinberg, Section 17(a) of the Securities Act of 1933 After Natafin and Redington*, 68 Geo. L.J. 163, 165 (1979).  
37. 446 U.S. 680 (1980).  
38. Section 17(a)(1) of the 1933 Act, 15 U.S.C. § 77q (1976) forbids the use of "any device, scheme, or artifice to defraud." The Court examined this language and concluded that the phrase connotes scienter. 446 U.S. at 696. By contrast, sections 17(a)(2) and 17(a)(3) do not contain similar language. In holding that these sections do not require scienter, the Court relied on its opinion in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185

(1976), in which the Court held that no scienter is required under the similar language of Rule 10b-5(b). 446 U.S. at 696.

39. Section 17 of the 1933 Act, however, is limited to sales. As Chief Justice Burger wrote in his concurrence: "I agree that § 10(b) and § 17(a)(1) require scienter but that § 17(a)(2) and § 17(a)(3) do not. I recognize, of course, that this holding 'drives a wedge between [sellers and buyers] and says that henceforth only the seller's negligent misrepresentations may be enjoined.'" 446 U.S. at 702 (Burger, C.J., concurring) (quoting *Id.* at 715 (Blackmun, J., dissenting)).

40. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified in scattered sections of 15 U.S.C.).

41. *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 945 (1969). Rule 10b-5 was unable to cover the tender offer situation because of the requirement that the deception be "in connection with" the purchase or sale of securities. Thus, Section 14(e) which did not contain such language was enacted. Section 14(e) covers the situation where a tender offer fails, yet there is no sale. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 38 (1977).

42. 17 C.F.R. § 240.14e-3 (1980).

43. 445 U.S. 222 (1980).

44. SEC Securities Act Release No. 6239 (Sept. 4, 1980), [1980] Fed. Sec. L. Rep. (CCH) P. 82,646; SEC Securities Exchange Act Release No. 17120 (Sept. 4, 1980), [1980] Fed. Sec. L. Rep. (CCH) P. 82,646. The new rule adopts a "disclose or abstain from trading" rule under the Williams Act.

45. Section 6 of the 1934 Act, 15 U.S.C. § 78f (1976).

46. Section 15 of the 1934 Act, 15 U.S.C. § 780-3 (1976).

47. *Id.* § 780-3(b)(3); section 6 of the 1934 Act, 15 U.S.C. § 78 (1976).

48. E.g., H. Manne, *supra* note 27, at 15; *Bleiberg, Want a Hot Tip? There's No Way to Prevent Trading on Insider Information*, *Barons*, July 6, 1981, at 7 (editorial comment).

49. E.g., *Bentson, The Effectiveness and Effects of the SEC's Accounting Disclosure Requirements*, in *Economic Policy and the Regulation of Corporate Securities*, 23 (H. Manne eds. 1969).

50. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

51. E.g., *Hetherington, Insider Trading and the Logic of the Law*, 1967 *Wis. L. Rev.* 720; *Schotland, Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 *V. L. Rev.* 1425 (1967).

## ABA/LSD PHIL RUSSEL REPORTS

et al.: The Justinian

The following is a report by Brooklyn Law School's ABA/LSD representative, Phil Russell:

Last weekend I represented the School at the Fall Conference of the Law Student Division of the American Bar Association in Atlantic City. The meeting brought together students from members schools throughout New York, New Jersey, Delaware, and Pennsylvania, as well as representatives of various ABA sections and programs from around the country. What follows is the report submitted last Wednesday to the Student Bar Association House of Delegates. I would urge all BLS students to avail themselves of the programs and opportunities afforded by the Law Student Division, and to read the report.

I would like to extend my thanks to the SBA Board and House of Delegates for supporting this school's active role in this year's Circuit Fall Conference in Atlantic City. The meeting, this past October 2-29, covered a variety of topics important to BLS students which I have briefly summarized below.

1. Students from Albany Law School, working with the New York State Bar Association's Law Student Division, are setting up a clinic program aimed at lobbying and monitoring the New York State Legislature on issues affecting law students, e.g. student loan financing and graduation requirements as well as substantive law issues of interest to students. Inquiries about the program can be directed to Steve Weinberger, 391 Morris St., Albany, NY, 112208, (518)465-9497 (evenings), or (518)455-4763.

2. The Second Circuit of the Law Student Division, which is comprised of all ABA member schools in New York State, has allocated \$70.00 for an ABA membership drive at Brooklyn. The money will probably be used to co-sponsor a regularly scheduled SBA school-wide party.

3. The Women's Law Caucus is looking for a coordinator to cover law schools within New York State. Eric Remensperger knows who to ask about it. (914)356-9211.

4. At the conference we heard a presentation and received an organizational packet concerning the national volunteer Income Tax Assistance Program—VITA—which the Law Student Division is co-sponsoring as law schools around the country in conjunction with the Internal Revenue Service and the ABA Section on Taxation. At most participating schools a faculty member and a small cadre of interested students provide free tax preparation services to community groups, local working folk, and school employees. The program has been reported to have generated excellent publicity and good experience for students who get excited about tax returns. Robin Kaufman, c/o Holland Law Center, University of Florida, Gainesville, FL, 32611, (904)392-0498, is the national director of the LSD's program.

5. Nancy Kates, a director of the National Appellate Advocacy Competition, addressed the Circuit meeting. She promised an exciting topic for argument this year, and warned that contestants in next year's competition will be required to be LSD members in good standing. The NAAC is perhaps the biggest Moot Court Competition in the country and generally attracts pretty well known judges for its semi-final and final rounds, which are held during the ABA's annual convention each summer. She can be reached c/o Law Student Division, 1155 East 60th Street, Chicago, Ill. 60637 (312)947-3919.

6. St. John's Law School is hosting this year's national "client counseling competition."

7. The National Council of Administrative Law Judges is looking for law schools interested in participating in a program which brings real administrative law proceedings into the school's moot courtroom, and real ALJ's in return guest lecture and allow students to observe proceedings. Glen Robert Lawrence, the Law Student Division Liaison to the ABA Section on Administrative Law, 1155 East 60th Street, Chicago, Ill., 60637, is directing the program here in N.Y.

8. The ABA/LSD Staff has announced that last year the Law School Services Fund, which provides up to \$750.00 in matching funds for eligible student activities, such as symposia,

guest lectures, debates, counseling activities, writing competitions, etc., was under utilized last year, and there's still plenty of funds floating around for this year. With our LSD membership currently above 47 percent (highest in the state), we are eligible for assistance, and applications are available through me or in the SBA office. The deadline for applications is December 1st.

8. The American Bar Association sponsors scores of Sections, Committees, Standing Committees, Subcommittees, Task Forces, etc., on virtually every subject of substantive and practical legal interests. There are sections on taxation, admiralty, negligence, regulation, labor, sports and entertainment, criminal justice (prosecution and defense are separate groups), civil rights and affirmative action, and aviation to name a few. Almost all of these groups select a qualified law student to sit in their governing board as a student liaison. Liasons vote on section policy, prepare amici briefs, help out with testimony and reports for Senate investigations, participate in state level lobbying efforts, and associate with national leaders in their chosen field of practice. Any student who's an LSD member in good standing can apply for any liaison position. Liaison application forms, to be attached to a resume, are available at the SBA office. The deadline for all applications is in December.

In order to increase awareness among BLS students about the endless activities and opportunities that ABA/LSD affords, the House of Delegates sent three first-year delegates to the meeting in Atlantic City. John Folcarelli, first-year evening, and Peri Hoffer and Dave Murphy, first year day, participated in every phase of the program. As a result, the first year students now have resident experts to consult on the information briefly presented above. Hopefully, more BLS students will become interested in the programs and national and regional positions available through the organization.

Respectfully submitted,  
—Philip Russell

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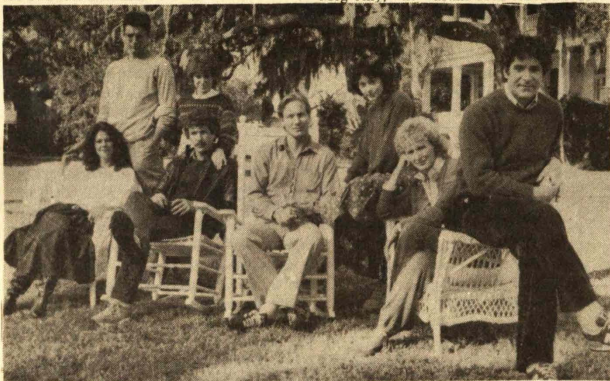
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# THE BIG CHILL

by Steven Eisenstein

*The Big Chill*, from Columbia Pictures, is currently playing in area theatres. Written and directed by Lawrence Kasdan, who wrote *Raiders of the Lost Ark* and *Return of the Jedi*, it is the alternately funny and poignant tale of seven old friends who meet after the suicide death of their mutual friend, Alex. It is the story of these seven University of Michigan alumni, from the sixties, who try to pick up the broken pieces of their relationships with each other, despite the changes in their worlds and in themselves. Even more, it is the story of our own lost idealism.



The characters come to grips with the problem of explaining their current lives to these old friends. They all must, in some way, rationalize their lifestyles, to themselves and to each other. Glenn Close and Kevin Kline are the hosts for the weekend. She is a successful doctor while he has turned his sixties campus radicalism into a thriving business called, of all things, Running Dog Shoes. Tom Berenger is the Tom Selleck clone, a T.V. idol, struggling to convince everyone, but mostly himself, that his career really has some meaning. Jeff Goldblum, the college newspaper writer, has settled into a journalism career with *People* magazine. Jo Beth Williams has become a frustrated housewife while William Hurt, though probably the least changed, has remained the black sheep of the group. He has found his niche as a drug dealer, though from

the look of things, he is not overly successful at it. Finally, Mary Kay Place, plays a character that should be close to all of our hearts. Upon her graduation from law school, she joined the public defender's office in Philadelphia. After a few years, she went the large firm route to take up real estate practice. "I thought I'd be representing Huey and Bobby and I ended up defending scum."

What these seven remnants of the sixties come face to face with, besides themselves, is Meg Tilly, who was the dead man's last lover

and a personification of the eighties. Where they were once committed and idealistic, she is simple minded, self-centered and shallow. Her biggest complaint is that, during the funeral procession, she does not get to ride in the limousine. In essence, she is what they are in danger of becoming themselves.

The movie does have flaws. The cinematography is somewhat awkward and the women's characters are never developed quite as well as the men's. But the movie is worth seeing and its message is worth thinking about. In these days of Reaganism we need all the youthful idealism we can muster. Whether we came to law school to make money, to help people or to change the world, we all need something higher to strive for. Let us hope that, unlike the characters in *The Big Chill*, we never lose it.

## CON LAW SEMINAR TAKES 8TH...

Continued from page 1

not be sentenced to death pursuant to *Enmund*. Professor Bentele has been a volunteer lawyer with the NAACP Legal Defense Fund since 1977, and during that time has represented petitioners in five death penalty cases. Bentele said that the lack of evidence was particularly favorable to the defendant's case, but the gruesome nature of the alleged crime, if true, was not. She further explained that the clerk of the Supreme Court had called the Oklahoma Attorney General's office after receiving the petition to request a response, which apparently isn't always done. She said that if a petition has no merit on its face, the Court will proceed without state response but added, "in all my cases, I've had state response." Professor Bentele feels strongly that student participation was important to the success of the petition and said, "There is no question that the final petition was improved by students both in terms of the petitions [they wrote] and the points brought out in class discussions." She added, "The chances were slim that the sentence would be vacated on direct appeal. The only thing that surprised me, and some of the students, was that the petition was successful." In death penalty cases, the defendant, after sentencing, will appeal to the highest courts in the state. If unsuccessful, he will then take a direct appeal to the Supreme Court, which is the stage at which Professor Bentele's class won in the *Smith* case. Often, however, the first direct appeal to the Supreme Court is unsuccessful. The petitioner then can make an application for a writ of habeas corpus in the state or federal courts and, if denied, appeal the application through the state or federal system. If denied at the highest court, he can make an application to the Supreme Court. In fact, Professor Bentele was quite certain that the defendant would have to make an application for a writ of habeas corpus, and advised her students this

summer that the issues which were researched but not included in the final petition for *certiorari* would be included at a later stage in the proceedings.

Many students expressed surprise that the case had been won at such an early stage, and noted their relief and gratification. Kate Dodge reported that while working on her paper she had repeated nightmares reenacting the events described in the transcript and expressed relief that the sentence was vacated. Daniel White commented, "It's one of the only things I've done in law school that has anything to do with justice." John Sokolow said, "I think that the entire conviction should have been vacated, rather than just the sentence. The fact that Smith was on death row for more than six years is yet another example of the inherent danger of the imposition of the death penalty and another reason why it should be abolished."

The fact that much of the petition was written by students did not seem particularly remarkable to the Brooklyn Law School com-

## HIRING PRACTICES

The Justinian, Vol. 1983 [1983], Iss. 6, Art. 1

Continued from page 1

discriminate, I can't, and if it doesn't I can do what I want." The law is "an official statement of values" to which BLS should adhere. If we want it to be more inclusive, we end up disagreeing on the facts, and that can lead anywhere he said.

Holzer's final objection is that we should not be limiting job opportunities for students. He said the job market is tight enough as it is, and the "JACG is a legitimate place to work, it's the United States Army." According to Holzer there are several adverse consequences to the students which result from our enforcing our own values on others. In particular, he said, we make life difficult for those students here who want to talk to the army, and we raise the issues of free speech and association.

By contrast, Kuklin suggests the law is not, by virtue of its silence, necessarily the proper standard to apply. He asked, "if there were no law regarding Jews or blacks, would we still allow employers who discriminate against them to recruit at BLS?"

Kuklin admits that it is a complex problem but says, "you can't have a just system which is unwilling to go onto the slippery slope. There is a danger of sliding to the bottom, but we have to take some risks so as not to unduly limit freedoms."

"This is an extraordinarily difficult and intriguing question" of political analysis, says Kuklin. "It is in many ways reminiscent of the Hart-Devlin debates" over the government's right to legislate morality. "It's very important that we be clearheaded in our decision-making."

Kuklin intends to solicit opinions from the faculty, staff, administration and students at BLS to help prepare the committee's recommendations. He also said the committee will examine "whether and how other institutions have coped with this issue." But other institutions' policies will only be considered as alternatives. BLS will "not necessarily adopt other models."

Finally, Kuklin says that though some fears were expressed that forbidding recruitment may require forbidding the placement office from processing applications. He said there seemed to be no "necessary connection" from one to the other and that this is "one part of the slope not excluded by logic."

munity, but it has caused quite a stir in Oklahoma. Denise Gamino, a Washington-based reporter for the *Daily Oklahoman* wrote an article for that paper which appeared on the front page of the Sunday, November 6, magazine section highlighting the constitutional law seminar's involvement with the *Smith* case. She told the *Justinian*, "It's very unusual not only that a class would appeal a death sentence as a class project, but highly unlikely that the Supreme Court would review it and grant it." She added, "It's not that law students don't have the ability—just that it's uncommon." Gamino also told the *Justinian* that David Lee, Assistant Oklahoma Attorney General, who answered the petition and made the concession, was impressed with the quality of the petition and referred to it as a "powerful document."

Smith's petition for a writ of *certiorari* is on reserve in the library, and the article which appeared in the *Daily Oklahoman* will be posted in the lobby and on the *Justinian* door when it arrives.

## JACOB

As in an illustrated Bible  
You lie in your deathbed;  
Rachel at your side,  
Skin gray against white sheets.  
You bestow blessings  
Individually  
Upon what will soon become  
Your only future;  
The seeds which have come  
To sow their own  
And those seeds soon  
To name their  
Children after you.

Generations in your prism eyes  
Refracting the remaining light  
That shone and guided me through youth.  
Now you've succumbed  
To impotence;  
Your fortitude  
Reduced to dust.

Oh how you sat erect  
At the head of the table,  
Drawing my cousins  
Closer to hear  
The tales of Baghdad.  
Much more glamorous  
To the memory than  
Being there.  
And fairy tales of monkeys  
And little girls who wouldn't  
Comb their hair,  
All the time  
Eating grandma's cookies;  
Chewy and sweet,  
Round as saucer-eyes  
With you at the head  
Of the table.

All the other kids  
Had Grandparents  
From Eastern Europe;  
Holocaust survivors.  
Some told heroic stories of escape.  
My friends,  
Huddled in secret society circles  
In a fruitless attempt  
To count to six million  
(a homework assignment)  
Hemmed their disbelief  
At our alienage.  
We ate rice  
On Passover,  
Celebrating our faith.

Now,  
I see you through the window, asleep.  
You rest  
Comfortably, at times,  
Shrouded in swathing  
As a baby Moses  
Floating  
Northward  
Up the Nile.

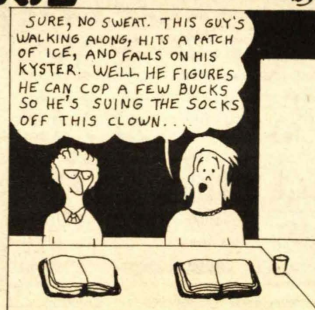
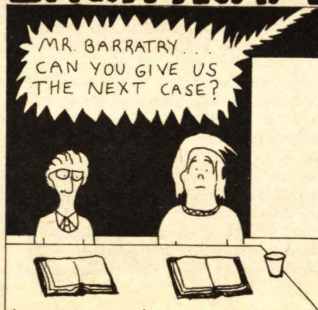
Ellen D. Smolinsky  
6/27/83

## The following students participated in the seminar:

Gerard Breen, Meyrl Cohen, Katharine Dodge, Winifred Elton, Risa Gerson, Leslie Gruenwald, Jennifer Hayes, David Howe, Joseph Hudak, Steve Kirschenbaum, Timothy McNamara, Carol Milder, Richard Pomerantz, Ann Ryan, Daniel Scanlon, Peter Schillenger, Jonathan Sokolow, Michael Swirsky, Scott Tulman, David Venditti, Daniel White, Marya Yee

## BACK-ROW BOB

by Longbow Matyas





By David Touger

The Brooklyn Law School Intra-Mural Football League has begun yet another season, and in the words of eight-year-veteran Stuart Orden (yes folks, eight years), "The competition is better than ever. BLS has recruited a bumper crop of first-year players this year from the local colleges." But, even with this influx of blue chippers, perennial powers over the past years, Ferder, The Adjudicators, and The Jebones, are fighting it out for top ranking. There have not been many upsets this season. The veteran teams have been able to stave off defeat by the young upstarts by use of their intricate knowledge of the nuances of football played the IMFL way.

In the biggest game of the year so far, The Adjudicators defeated The Jebones 2-0 in a tough two hour battle. As The Jebone captain, Mitch Greebel, said after the game, "They won this battle, but the war rages on. We will get them in the playoffs." The game was characterized by the tough hitting that has become the norm when these two teams meet each other. As Bill Barber, wide receiver for The Adjudicators said, "It was the Hatfields vs. McCoys out there today, but we were able to hold them at bay and pull out a tough win."

The season is far from over. The Nomads, a second year team led by Ricky Nunez, is putting up a good fight to break into the top of the league and supplant Ferder from their usual spot. Nunez said, "Nobody gave us much of a chance in the beginning of the season, but we have been handing out our share of punishment from the start and we will continue to do so." Top ranking among the teams will be decided in future weeks, as Ferder once again takes on their arch rivals The Adjudicators and The Jebones, and the Nomads continue their fight to the top.

David Touger is Commissioner of BLS-IFL.

## LEGAL WRITING COMPETITIONS

The following competitions are open to Brooklyn Law School students.

For further information about any of these writing competitions, see Professor Walter or check the third floor bulletin board near the student lounge.

**Trademark Law**—Steven P. Ladas Memorial Award, \$500 prize. Topic: Trademark law.

**Insurance Law**—International Association of Insurance Counsel, \$1,000 first prize, \$500 second prize. Deadline: April 1, 1984. Topic: Insurance, tort and compensation law.

**Health Law**—Catholic Health Association, \$1,000 first prize. Deadline: March 1, 1984. Topic: Issue affecting provision of health care in Catholic hospital.

**Products Liability-Health Law**—Health Committee, ABA, \$1,000 first prize. Deadline: December 1, 1983. Topic: Company's potential liability arising out of its own research findings.

**Alternative Dispute Resolution**—Center for Public Resources, \$2,000 first prize. Deadline: December 31, 1983. Topic: Alternative dispute resolution, dispute prevention, litigation management.

# LETTERS...

Continued from page 2

death intimately. Act as a revolutionary—in like Jefferson was a revolutionary—in El Salvador, then you know oppressive, visceral fear. I hear and read stories (not in the mainstream press) of young Salvadoran girls being brutally raped by government-sanctioned (whose government we sanction) death squads and sentenced to watch the slow mutilation of their parents because their father or mother spoke openly about freedom from tyranny. Then, dear students, I will respect your judgement. But not when the only danger you were in was when the American Rangers overran the island, and only then from stray bullets or misfired mortars.

I am most disappointed by our "free" press. They reported military press releases as fact. They were lied to by our President and these same officials while being censored in their freedom to cover events; but they complained only about the pictures lost. (Nothing like a war to up those ratings.) Then they ran those stories about the Grenadians hailing their conquering heroes. But history has seen this trick before; it is the war as seen through the eyes of the righteous invaders. The Nazis innundated the Germans back home with similar pictures—though not as slick, to be sure—of the French welcoming their "liberators." The Russian government also never experiences any difficulty locating happy Poles glad to see that the Russian presence has "restored order." Yet although world opinion overwhelmingly deplores our actions, our closest allies included, the U.S. media seems incapable of finding articulate spokespersons with an alternative point of view. Oh, there is the occasional disgruntled congressperson from the "other" party, but usually he/she wants more facts before making a definitive statement.

Closer to home, I am disappointed in Brooklyn Law School. The general indifference exhibited by the student body is abetted by the complete disinterest of the faculty at large. What is law school if not the study of societal politics and its relation to justice? Is the study of law as abstract as professors here pretend? Are pertinent policy discussions only for the Harvards and Yales and not for middling Brooklyn Law? Or is it mere faculty indolence, something resembling routine as a saving grace?

The United States government has invaded illegally and immorally a sovereign nation—contrary to signed treaties and universally accepted international law—and not one of my six professors has made even a passing reference to it. Then they wonder why students appear detached and uninterested in law. If a law school, a supposed institution of higher education, ignores our country's illegal actions, how can we expect society as a whole to wrestle with these issues? Issues, by the way, a bit more critical to man's survival than product liability, offer and acceptance, and citizen diversity as a basis for federal jurisdiction. Come to Brooklyn Law, learn law in a vacuum.

Where are our priorities? As a people, we willfully squash those who do not align with our politics. If we truly cared about people, as our rhetoric purports, then why haven't we gone into El Salvador, a country with 1.5 million refugees, to "establish democracy?" But in our moral duplicity, we care about systems, not people. The system of El Salvador is "good" because capitalism—our version of God in our own Christian Crusades—flourishes; whereas in Grenada, their system was "bad" because they were "Marx-

et al.: The Justinian

ist." Bertrand Russell called this nursery thinking: a child is "good" when he/she behaves and "bad" when he/she misbehaves; similarly, a foreign country is "good" when it behaves as we want it to behave (capitalistic and dependent upon the U.S.) and "bad" when it does not (worker-oriented economy and nonalignment or alignment with other "bad" systems).

This simplistic thinking is dangerous. It justified the Viet Nam war (51,000 Americans and 305,000 Vietnamese dead) and presently the propping up of military and fascist dictatorships throughout the world. It is the "us" versus "them" mentality, where "they" embody evil and "we" embody goodness. But however we cloak it, it is fascism. We have already begun to see one of the results: body bags. When Reagan finds some rhetorical justification to invade either Cuba or Nicaragua, we will see even more body bags.

There are two logical ways of looking at our invasion of Grenada. First, that Reagan invaded Grenada, an essentially defenseless country, for political gains. If this is so, our President is a sick, odious, and Machiavellian leade, who should be impeached. The other way of looking at the invasion is that Reagan is sincere in his belief that we must "expurge the evil communists" from this hemisphere. If this is so, we are in for a bloody time. Nicaragua and Cuba are not Grenada. They will fight gallantly and to the last man and woman against American imperialism, and it will be costly on all sides. It could also lead to a regional confrontation with the Soviet Union, who Reagan often says is behind all the world's evils anyway. And this apocalypse will have no survivors.

Ironically, as a people we are willing to take chances in war, but unwilling to be brave for peace. Sadly, this will be our epitaph.

—Robert Axford

## WHO DID WHAT TO WHOM?

To the Collective:

Title: WHO DID WHAT TO WHOM?

Parties: Student, plaintiff  
Teacher, defendant

Facts: God created the heavens and the earth. Student transferred into Teacher's class after one week of school. Teacher informed Student that because he considers the classes missed before Student came into the class as absences, Student cannot miss the class before Thanksgiving so as to make the only available flight home for the holiday.

Student is told by the Administration that his only recourse is to miss the class in question and hope the Faculty Committee will agree with the Student when it meets "sometime next semester."

Issue: Will student miss the class before the holiday and take his chances with the Faculty Committee? Don't be ridiculous — Judgement for defendant.

Law: Teacher can do anything he wants.

Reason: ?

—Michael H. Arwe

# SBA...

Continued from page 5

law." This reasoning was rejected when Delegate Scott Pollock and Treasurer Lance Dandridge spoke against it and it became clear that there was little support for Graham's position.

"We're lawyers," said Pollock. "There is a legal basis for this." Dandridge concurred, "the international law violations are the key (issues)... territorial sovereignty was clearly violated."

The resolution was passed without amendment. Copies are to be sent to President Reagan and New York Senators Daniel Patrick Moynihan and Alphonse D'Amato.

In other business the SBA noted that last year's furor over the clinical program may have been premature. Delegate Judy Fensterman said that Professor Holzer and the other clinic heads are "making a sincere effort to place as many students as possible. Just about everyone who wanted to be placed received a placement in some clinic." Fensterman said several faculty on the clinical committee "feel out of touch" and are preparing a questionnaire to obtain more student input.

Treasurer Lance Dandridge announced that the SBA had finally received a check from the administration. The budget for the 1983-84 academic year is \$26,000. Budget hearings were to be held November third to eighth and an emergency SBA meeting was scheduled for November tenth to finalize the SBA budget. The SBA agreed that the budget hearings would be closed to permit candor.

In other business, the SBA formed a nominating committee to fill empty committee positions, reported there was no truth to rumours that the administration intended to phase out the night school, and rejected a resolution calling upon the Justinian to print the tallies of all roll call votes. The resolution was rejected by rollcall vote after the Justinian reported to the delegate that it ordinarily reports the tallies of such votes, and after several delegates expressed a fear that such a resolution unnecessarily impinged on the freedom of the press.

The SBA also heard reports on Dean David Trager's proposed Alumni Lecture series, the food service, and the recent ABA/LSD conference in Atlantic City.

## Interviewing?

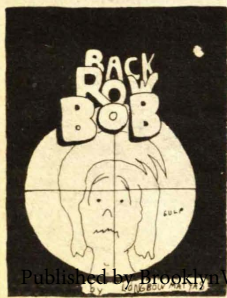
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