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The New York Law School REPORTER

Vol. IV No. 1

ALL THE NEWS WE CAN FIND

OCT./NOV. 1986

WHO'S ON SECOND? THE RANDY JONAKAIT STORY

By Robert Goldman

When Randy Jonakait was growing up in Wisconsin, he wanted to be a baseball player. It was a short-lived dream. At the ripe old age of 13, Randy couldn't hit a curveball.

Some dreams die hard. But Randy soon found a second passion—the law. The new Associate Dean said he was initially attracted to law because “There is an element of social justice, of anti-authoritarianism in me. When an authority says ‘do something’, someone should always ask ‘why’; if something should be done, there should be someone to make sure it is done fairly. I see that as a role of a lawyer.”

Jonakait graduated cum laude from Princeton in 1967; graduated with honors from the University of Chicago Law School, 1970, and in 1971 he received his LL.M. in the area of civil liberties from the New York University Law School. Jonakait began work in the criminal defense division of the Legal Aid Society of New York the same year he received his LL.M.

“It was valuable work to be a criminal defense attorney. Money held less interest for me than doing interesting work,” said the 41-year-old dean. The highs were higher and the lows were lower than teaching. But after eight years at Legal Aid, I felt burned out.”

In 1979, Jonakait left his job as a supervising attorney for Legal Aid to teach at Pace University Law School. He remained at Pace until September, 1983, when he came to New York Law School.

“Teaching gave me the chance to reflect more and to write articles that might affect the law,” said Dean Jonakait. “As a trial attorney, you’re on a treadmill,” he added.

Jonakait finds there’s “less visible activism” today than when he went to school in the 60’s and early 70’s. “There is still a questioning and a skepticism towards authority. But students are more concerned with jobs and money now. Some students will be going to Wall Street even though they don’t expect to enjoy the work.”

When he was asked about NYLS’s students, the new dean responded that there are many good students here. He believes, however, that “too many students have a feeling of low esteem about New York Law School, and that is a mistake. Too many students fail to recognize the good things about the school and only focus on the bad.” As an example, he cited student evaluations of the faculty, which, he said, indicate



Associate Dean Jonakait

that, with one or two exceptions, students are overwhelmingly positive about their professors.

Jonakait said, “Some students allow a bad experience to define the school for them when, in fact, they have almost always received excellent teaching. I doubt any school has a higher percentage of outstanding teachers than we do. I know that when I went to law school, I had some mediocre professors, at least as many as we have here, but I recognized that the school was good because of all the good teachers it had.”

Dean Jonakait said, “Advocacy courses should be considered as part of the core curriculum. The courses are often good, but they have grown up in an ad-hoc fashion. We need greater coherence in this area rather than just a collection of separate courses. We need to emphasize this part of the curriculum because a high percentage of our students go into jobs which take them to court frequently.”

Prof. Jonakait served as adviser to the NYLS Moot Court Association last year. He said, “Moot Court is not perceived by the student body as

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SIMON: Rehnquist Lacks Leadership Qualities

By Jaime Steve

Dean James Simon said William H. Rehnquist will not be an effective Chief Justice of the United States unless he learns to compromise and to accept the “dominant political value of protecting the rights and liberties of the individual.”

Simon expressed this view during interviews with *The Reporter* and in a September 24 lecture given at Franklin and Marshall College.

According to Simon, who has written two books about the Court and is working on a third, Rehnquist appears to lack the qualities that allowed other chief justices—particular, John Marshall and Charles Evans Hughes—to lead the Court. The first, internal leadership, stems from an ability to work effectively with the other justices to build consensus opinions. The second, external leadership, comes from understanding the Court’s institutional mission as that of “protecting the individual liberties guaranteed in the Bill of Rights.”

Internal Leadership

Despite Rehnquist’s reputation as an affable individual who possesses great intellectual horsepower, he comes up short as an internal leader because Rehnquist has no background in the give and take of electoral politics where he would have learned to compromise, Simon said. “Compromise, so far, does not seem to be a word in Chief Justice Rehnquist’s vocabulary,” he added.

Meanwhile, Rehnquist himself has written: “The chief justice must be not only a jurist, but interlocutor of the judicial minstrel show, a planner, and occasionally a statesman. Surely training in the rough and tumble of politics is no hindrance to the performance of these tasks.”

While Simon’s evaluation may prove correct, Associate Justice William J.



Dean James Simon

Photo by Bunji Fromartz

Brennan Jr. gave a different forecast. Asked by the *New York Times* what kind of chief justice he thinks Rehnquist will be, Brennan said: “... I do think that [he] is not going to be a loner to the extent that he has been one... I think you will see less of [his lone dissenting opinions]. This means he may have to moderate some of his positions. My guess is that he is going to do it.” Brennan also indicated that Rehnquist’s amiable personality will contribute to his success as chief justice.

External Leadership

Rehnquist’s potential as external leader of the Court is only minimal, Simon said, because “he has consistently favored government interests over individual rights and liberties.” Simon said Rehnquist’s approach, in this area, is inconsistent with the views of the most effective chief justices of the past. He characterizes the new Chief Justice as the champion of “an activism not consistent with the letter and spirit of the Bill of Rights.”

While Simon concludes that Rehnquist will not be an effective leader of the Court, he is quick to say, “I’m more frightened that he would be effective.”

MEDIA LAW CLINIC TAKES ON TIME INC. IN LAWSUIT

by Ilya Frenkel

NYLS’s Media Law Clinic is pitted against Time, Inc. in an anti-trust suit which awakens the biblical images of David and Goliath.

The antitrust suit, recently filed by the Media Law Clinic on behalf of the Association of the New York Citizens Committee on Cable TV, promises to raise interesting antitrust, cable, communications and First Amendment issues. The decision may well be a landmark should the court lend its ear to the plaintiff’s cause. The publicity surrounding the case has already put New York Law School into the limelight. One of the attractions of this case is that the named defendants—Manhattan Cable, HBO, Time Inc. and others—are represented by the legal industry’s Rolls

Royce—Cravath, Swain and Moore of New York.

The Media Law Clinic is headed by professors R. Perry, D. Rice and M. Botein, renowned experts in the fields of communications law, administrative law and antitrust law. The clinic has marshalled all its available resources to launch a strong case against Time, charging it with various antitrust violations. The suit has been filed in the United States District Court for the Southern District of New York.

Cravath attorneys initially did not expect to see such a show of brute force from some downtown law school’s clinic and prepared themselves for an easy victory with a two-page brief. Their misconceptions were shortly remedied. When United States District

Judge Sweet heard the arguments on defendant’s motion to dismiss, the two sides crossed their swords on an equal footing in terms of their competence and preparedness.

The gist of the lawsuit can be briefly explained via a quick market analysis of the lower Manhattan cable television service. Since 1974, defendant MCTV, a Time, Inc. subsidiary, has held the franchise from the City of New York to offer cable service below 79th Street on the West Side and 86th on the East Side. The only two non-sports pay TV movie services offered on MCTV are HBO and Cinemax, both subsidiaries of Time, Inc. Other pay TV services such as Showtime, Bravo, the Disney Channel and the Playboy channel simply can-

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The New York Law School REPORTER

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EDITORIAL: One Man—One Vote? Not At NYLS

Dean Simon opened up the democratic process to students by allowing a student speaker at commencement chosen by the student themselves. "The students should have a voice," he said.

But at the 1985 commencement, student speaker Carmella Kurczewski committed the grievous sin of expressing her dissatisfaction at the wrong place and at the wrong time.

SBA President Michael Cintron said "Dean Simon said that if there was another speech like Carmella's, there would not be another student speaker at commencement."

A compromise measure was reached between Dean Simon and the SBA's executive board in which Dean Simon chose last year's speaker from three candidates following an election held by the graduating class. The agreement is still in effect.

While Dean Simon recognizes the need for a more open dialogue with students, the agreement reached between Simon and the SBA's executive board undermines the process of giving students a voice at commencement.

The Dean's concerns may well be legitimate. He expressed the view that students may choose a speaker who has not made a real contribution to the law school community. He is concerned that the evening division may be disenfranchised by a direct vote. And he is concerned that a student speaker may criticize the school at a commencement rather than using a more appropriate forum.

But Simon's action has undermined the expectations he set in motion—a student voice, of our own choosing, at graduation.

A democratic process of decision-making does not always lead to rational ends. People often make the wrong choices. Democracies are imperfect. The

biggest vote-getter may not be the best speaker. But does it necessarily lead to a better result for the Dean to interfere with the democratic process by choosing the student speaker from one of the top three candidates chosen by the students?

The answer to that question depends on one's values. We believe that students at this school should have the power to choose their own representative to speak at commencement. The best end-result is to put teeth into the democratic process. Democracy is an end in itself even if there are intemperate remarks or unforeseen consequences along the way.

The question, "What will the speaker say?" begs the underlying issue. The real question we should ask is "whose voice will be heard in the name of the student body?" Who speaks for the students? A hand-picked spokesperson or a democratically-elected student speaker?

Dean Simon has chosen to limit the democratic process so as not to disenfranchise the evening division. Why not broaden the process instead so that NYLS would have two speakers, one from the day division and one from the evening division? The commencement might take fifteen or twenty minutes longer, but the NYLS community would gain from the diversity which is a necessary component of broadening the democratic process.

We commend the Dean for wanting to create an open dialogue with students this year. A dialogue that is open must be based on the premise that students should receive all available information to give maximum input into the decision-making process. If the channels of communications are truly open, appropriate forums will be utilized for the airing of students concerns. Students will express their concerns at these forums, and not at graduation.

Media Lawsuit

Continued from page 1

not be accessed on cable TV by anyone residing in the area of the MCTV's franchise.

The clinic seeks to change MCTV's policy of not carrying any unaffiliated pay cable services. Plaintiff contends that the Time defendants have combined and conspired to restrain competition and that it has monopolized the market for pay cable movie and non-sports entertainment programming service in lower Manhattan. Programmers have been denied access to MCTV'S Cable Channels.

As consumers have learned from the centuries-long experience of dealing with governmental and private monopolies, absence of competition normally leads to higher prices and low quality of goods and services. But here the problem is particularly egregious. Manhattanites have been deprived of probably the most valuable incident of residing in a part of the 'Free World'—freedom of choice. While 'freedom of choice' may seem petty and inconsequential to those who do not appreciate diversity in cable TV—a typically American phenomenon—the fact of the matter is that a wider range of choices in pay cable services are unavailable to those New Yorkers who embarked on their pursuit of happiness below Harlem.

Basing its claims on sections 1 and 2 of the Sherman Act, section 16 of the Clayton Act and the NYC Franchise Agreement, plaintiff is asking the court to adjudge defendant's conduct as violating the U.S. antitrust laws and direct it to make leased channels available to unaffiliated pay TV services.

Interestingly, the parties who were directly aggrieved by MCTV - unaffiliated cable programmers - declined to join New York Citizens Committee on Cable TV in its suit, allegedly fearing retaliation in other geographic markets where the defendants do allow them access to their local cable channels. Initially, the suit also named Ed Koch, Andrew Stein and various other city officials, asking the court to enjoin them from failing to enforce the terms of the city franchise. Later on, however, plaintiff agreed to drop them as defendants. This was necessary to keep the litigation manageable for the clinic and to concentrate on the main wrongdoer—Time defendants. As it is now, at the motion to dismiss stage, the suit has already produced 100-page memorandums from

each side, indicative of a long battle. Both sides showed willingness to take the case to the United States Supreme Court, if necessary.

The legal issues raised by the case posit some complex and controversial questions which are likely to have a profound impact on the U.S. cable TV industry. At the heart of the matter are the definition of relevant product market; the question of MCTV's vertical integration and its limiting effect on market opportunities for unaffiliated national pay programmers; the issue of the franchising process and its supposed authorization of lawful monopoly; the issue of antitrust injury in the absence of competition among hardware vendors legally sanctioned by a municipality; hardware-software dichotomy in cable programming business; state action immunity; first amendment protection for a cable operator and various antitrust standing questions.

The major question is whether the decrease in consumer choices is a type of injury sufficiently direct and non-speculative to be redressed by the courts. Defendants claim that if the underlying legal basis of the suit were accepted, a cable operator will have to carry an infinite number of cable services because there is no limit to the principle of diversity and competition in pay TV programming on any given cable franchise. Thus, the outcome of the suit will eventually test the limits of the antitrust laws themselves and their applicability to the Time fact pattern.

Jonakait

Continued from page 1

prestigious or as important as it ought to be." He is presently exploring with the Moot Court Board several possible ways to improve the prestige and educational benefits of the program.

At NYLS, Dean Jonakait has taught evidence and criminal procedure. He strongly believes in the role of the defense attorney. "It's important to defend clients in a criminal trial fully and attempt to get an acquittal even if they are guilty. It's important to make the state have to prove a case beyond a reasonable doubt," he said.

Dean Jonakait lives in the Fort Greene section of Brooklyn with his wife, Mill, a biologist at Rutgers University, and their five-year-old adopted daughter, Amelia, who was born in Korea. Jonakait intends to resume teaching this spring and to continue as Associate Dean.

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higher than the expected cost. Dean Simon said the methodology of the Gourman Report "has been discredited in other publications. Critics have said that the methodology is flawed. Gourman rates every school at the same level at every category. But surely, some institutions are better in some categories than in others. I understand that he [Gourman] doesn't share his methodology with anyone."

The latest Gourman report ratings of law schools, published in the fall of 1985, show NYLS dropping from 74 to 86.

for Dean Simon to choose the student speaker at a measure reached by Simon and the SBA's executive

choose the student speaker from three candidates. The three candidates under consideration would be the top vote-getter of the evening division.

last year that the administration would not allow another speech like Carmella's, there would not be

the student speaker was chosen by a direct vote of the students. The student took the podium after Governor Cuomo's speech this afternoon to go out and do one thing stopping us from doing so. We can't find students out of NYU or Columbia. The problem is we demand for New York Law School students of all

trustees come must be made to realize that the majority of our students, are qualified and capable of being given the same education provided by other area law schools. We have their students in good standing the opportunity of New York Law School will not be able to take its place in the employment needs of its students," she

continued her speech, in this vein: "Before coming here we who haven't as yet found legal employment to see live jobless bodies and not mere statistics on a screen. It's too embarrassing to have to admit that after graduation, we can't find jobs and we can't get our

measure, and he still supports it. "I think having a student speaker is a greater honor for that student and

especially in light of the circumstances. Unless there was a direct election, I would support the present system,"

in a telephone interview with *The Reporter*, said, "I don't want to be analyzed and lose their freedom of choice because a decision is going on. They're upset because they were being told by the Governor of New York. Some justice we're learning

UP FROM THE UNDERGROUND: ON R.E.M. JURISDICTION

By Dianne Pine

Remember spinning in place with your eyes open, going faster and faster until the trees blurred and you collapsed, giddily on the grass and watched the sky spin? A R.E.M. can do that. The music swirls around you, layering texture upon texture, Michael Stipes breathless vocals whir in your ears and the band races euphorically along to a giddy end. Just like spinning in place.

Remember sitting by the window on a rainy grey day, dreaming of romantic adventures in faraway places? A R.E.M. song can do that too. Quiet moody haunting melodies make you close your eyes and Stipes' lyrics allow you to make beautiful but vague images of things that can't ever really be seen.

For 5 years R.E.M. has been alternately praised as the saviors of American Music, yet damned for being pretentious arty phonies. Michael Stipes' lyrical sketches, delivered in a half mumbled, hushed style has had people curse him, yet praise him as a visionary poet. The rest of the band (Peter Buck, guitars; Mike Mills, bass; Bill Berry, drums) has been criticized for being too simple, yet an entire music movement has grown around them spawning soundalikes by the dozen.

Either way, R.E.M. does something to the people who listen to them. For me, their first EP, reached out, grabbed me and changed the way I felt about music. It was an epiphany and ever since R.E.M. has held me in the vortex of their swirling 60's inspired music.

Lifes Rich Pageant is R.E.M.'s fourth full length LP (5 if you count the EP). For the first time R.E.M. has managed to put the correct balance of fast songs & slow songs making *Lifes Rich Pageant* their most perfect album to date. Critics are still damning them, but maybe that's because this time, R.E.M. just might get the commercial following they deserve. This time we can hear almost all of Stipes lyrics and while understanding them might be albums away, at least we can sing along. In keeping with R.E.M.'s

humor, the sides are *Dinner and Supper* and as usual the songs are listed in no particular order of the back cover.

Begin The Begin opens the *Dinner Side*. It's got a funkier beat than most R.E.M. songs which makes it perfect for dancing. Listen for punny lines like "Miles Standish Proud."

These Days and *Hyeana* are typical of the style which grabbed me from the start. Fast - paced, fun romps, which leave you breathless, start spinning around!

Cuyahoga falls into the haunting category. This tale of a dying river in Ohio, has Stipes repeating the Indian word in such an uplifting manner that its hard to reconcile it with the more serious lyrical content.

The LP's single and video is *Fall On Me*. A song which contains a swaying steady beat and a haunting melody which sticks in your mind. Although its been said the song is about acid rain, its hard to tell, even with a video which has the lyrics, in their entirety, flashed word by word on the screen. Never mind the song is so powerful on its own you hum along regardless.

Dinner closes with *Underneath the Bunker* a latin flavored throw away. *Supper* side's 3 rave-ups are *I Believe*, *If We Gave It Away* and *Just A Touch*. All three are uplifting and fun. *I Believe* has a banjo beginning, which breaks into a guitar riff similar to the beginning of Springsteen's *Rosalita*. *I Believe* continues on with Stipe singing in a hopeful uplifting voice. Listing all the things about nature & life that he believes in (although your guess is as good as mine). *Just A Touch* has punchy keyboards and a hint of garage - rock wildness making it my fave track.

The Flower of Guatemala, has rich, lush vocal layers and a dreamy melody. *Swan Swan H.* is more like a poetry reading over beautiful acoustic accompaniment.

Supper closes with *Superman*, an obscure 60's garage-rock chestnut

originally done by *The Clique*. Mike Mills handles lead vocals and the song has an eerie psychedelic feel.

Taken as a whole *Lifes Rich Pageant* does a very good job of capturing the diverse aspects of R.E.M.'s multi talented members. Living up to the reputation they have is hard-almost as hard as understanding the vocals. But R.E.M. doesn't take themselves as seriously as their critics & fans do-the vocals change nightly with what Stipe feels the audience thinks the song is about. And on a good night the band covers *Velvet Underground* and *New York Dolls* songs.

Pure & simple R.E.M. stands for fun. Don't wait for personal service to go down to the Felt Forum on November 6-7 and join the dance party!

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FROSH PERSPECTIVES: "I Should've Stayed At Burger King"

By Donald C. Hanratty, Jr.

I traveled to New York Law School a couple of times over the summer so I wasn't too shocked to see, on the first day of orientation, that my new school was no larger than a Pathmark Super Center. But I was shocked by a comment I heard on my way to "A" building. As I passed by the bay windows of "C" building, I overheard the conversation of two men, one looking like Sylvester Stallone, the other like Gloria Vanderbilt.

Mister Stallone's double asked, "What building was that?"

Vanderbilt said, "I don't know. It looked like a restaurant or something."

My first reaction was one of school pride, and I was going to alert them to the fact that that building happened to be my law school. On second thought I realized they were right. The bay windows looked as though a Diners Club Card sign should be posted.

As I entered the library on the first day of orientation, I knew what to expect. I have seen all 135 episodes of *The Paper Chase* and I knew that the majority of people would probably be dressed James T. Hart style. So I dressed *Paper Chase* style. If Professor Kingsfield had walked in the door, I would not have been the least bit surprised.

After the first day of orientation I was convinced of two facts. One, everyone there saw *Legal Eagles*. Two, everyone saw at least one episode of *Paper Chase*.

During our first class, the professor was trying to get across the difference between a holding and dictum. After a little while and with great expectations that I was finally grasping the concept, I raised my hand. When I was called on

by the Kingsfield impersonator, I uttered with assurance, "So a holding is only the decision of the court on the material facts that are actually before it. All else is dictum."

The professor quickly corrected, "Dicta"

Now with puzzlement intensifying, "So what's dictum?"

"One dicta," he answered.

"What's two dictum?" I asked sarcastically.

"DICTA!" was his one word Kingsfield style reply.

Quickly jumping to my feet I let out the longest stream of gobbledygook I have ever spoken. "So, one dicta is two dictum and no holding, but only a persuasive authority." After I said my piece, I realized I didn't have the slightest idea of its meaning. I decided then and there it was a mistake to give up my job at Burger King.

During the first week of classes, the professor alerted us to some interesting information. He told us we would not be taught the law. We would, however, be taught to think like a lawyer. For this, I will pay nine thousand dollars a year. I can get this information from watching *Perry Mason* reruns. This news was very disquieting to me. I really thought upon entering law school, I would finally know why it was against the law to remove the tag on my mattress that read, "DO NOT REMOVE UNDER PENALTY OF LAW!"

By the end of the third week of classes I grew accustomed to the strenuous work load. I now accepted as standard law school practice for the professors to give us so much work that my casebooks supplanted the *National Enquirer* as reading material in the bathroom. By accident, I left my legal

methods book in there. Much to my chagrin, my mother came out of the bathroom and asked me where I got this pile of junk and demanded to know what I had done with her *National Enquirer*.

The work load was so heavy that I had to read on the Long Island Rail Road while I went to and from school. I quickly learned the proper procedures for behaving on the train. First, always push and shove the person in front of you, regardless of age, to get the seat they had intended to sit on. Second, quickly fall into what appears to be a deep coma so no one will talk to you.

I always felt out of place if I was the only one not in a pseudo-coma. So I decided to do my reading at home, and act like a "COMMUTER." I carried out this act for two days. Then, on the third day, the person who was acting next to me, wasn't acting, but was really asleep. His head slowly lowered on to mine. Thinking quickly like a commuter, I jerked my shoulder with such velocity, that his head jerked back and forth like a pendulum. The fright on his face was so horrific that when he looked at me, it appeared as though he had seen something from *Alien* come out of my face. I smiled slyly and resumed my pseudo-coma.

The next three years of my life promises more of the same. It also promises things that are entirely different. I have worked hard and given up a lot for this exhilarating experience. After I make it through these three years I hope to some day go into a courtroom and exclaim as Al Pacino did in *And Justice For All*, "NO YOUR HONOR, YOU'RE OUT OF ORDER!"

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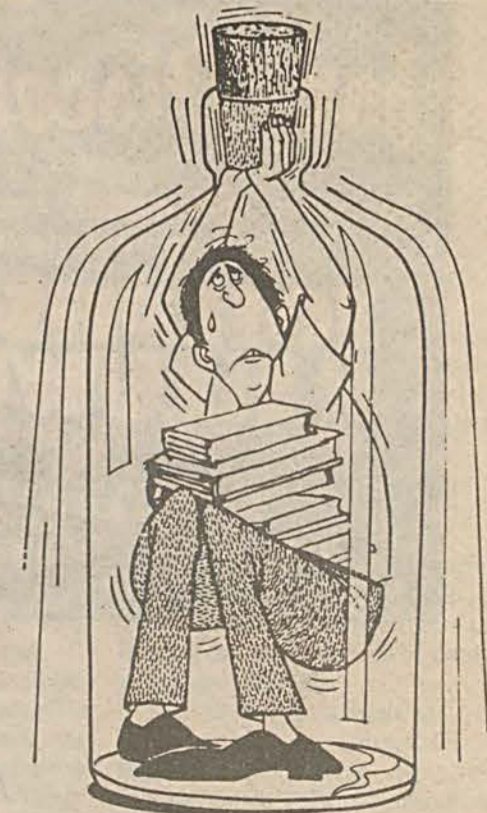
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September

| SUNDAY | MONDAY | TUESDAY | WEDNESDAY | THURSDAY | FRIDAY | SATURDAY |
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| 28 | 29 | 30 | | | | |

October

| SUNDAY | MONDAY | TUESDAY | WEDNESDAY | THURSDAY | FRIDAY | SATURDAY |
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November

| SUNDAY | MONDAY | TUESDAY | WEDNESDAY | THURSDAY | FRIDAY | SATURDAY |
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