The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW

AUTUMN 2006

IN THIS ISSUE

Civil Procedure Rules: A highly regarded cadre of NYU faculty show students how to make the right legal moves.

Mass Appeal:

Top legal minds consider the pros and cons of class actions.

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belief that "people need to sit together and find a solution" when it comes to containing the nuclear threat.

Message from Dean Revesz

any of you will remember struggling in your first year over *Pennoyer v. Neff* and *Erie v. Tompkins*. So you also know that civil procedure is the point where theory meets practice, where conceptual brilliance and sensible street smarts are equally necessary.

In "The Rules of the Game," on page 24, we trace the formation of a truly outstanding team of men and women who influence the administration of law in this country through their own remarkable scholarship, but never lose enthusiasm for initiating lawyers into the ways of their profession. While most of them don't go so far as Professor Burt Neuborne-who burns his notes each year so that he can approach the classroom with a fresh take each fall-every one of our civ pro professors admits to being somewhat addicted to teaching this important subject. As regular readers know, since I became dean, each issue of The Law School has featured an academic area in which the NYU School of Law has excelled: International Law (2002), Environmental Law (2003), Criminal Law (2004), Law and Philosophy (2005) and now, Civil Procedure (2006). I'm confident that, in each of these areas, an objective panel would agree we have the strongest faculty among the leading law schools.

A related story, "Heads of the Class," on page 36, showcases an edited discussion of a much-maligned tactic, the

class-action lawsuit. We invited eminent alumni who often represent clients in mass tort cases to join our faculty experts for a sometimes heated, always nuanced and often amusing conversation about the whys and wherefores of this legal instrument. I am grateful to all of the featured faculty and the esteemed graduates who lent their expertise and gave generously of their time to make both civil procedure stories come together. Visiting Professor Arthur Miller, who moderated the roundtable with aplomb, deserves a special note of appreciation.

It's impossible to imagine a more timely and engaging choice for our cover profile than alumnus Mohamed ElBaradei (LL.M.'71, J.S.D.'74, LL.D.'04), who won the 2005 Nobel Peace Prize in December. The director general of

the Vienna-based International Atomic Energy Agency, a multilateral organization charged with the formidable task of forestalling nuclear weapons proliferation, consented to a rare interview in the midst of a particularly difficult period—as tensions over Iran's nuclear activities continued to mount. "What Price, Peace?," on page 12, provides a chance to get to know ElBaradei, who tells writer Daniel Benjamin, a senior fellow at the Center for Strategic and International Studies, that while his role is technical in nature, he has to "look at the big picture." He adds, "I feel I owe it to the member states to tell them how I see things from where I sit. I have to do verification, but I also have to see how the international community can use this for a peaceful resolution." Benjamin came away from his interviews with and about ElBaradei enormously impressed with the man. "He's an international civil servant in the best sense," says Benjamin, who traveled to Vienna to meet with his subject. "ElBaradei isn't afraid to do what he thinks is right-and he's got a very tough job."

As you make your way through the rest of this issue, you'll also get to know the seven faculty members who joined us this year; their profiles begin on page 52. I'm excited to report that we've hired 18 outstanding professors in the four years since I became dean. As a result, the size of our full-time faculty has increased significantly, improving our student-faculty ratio

> and solidifying our preeminent position in many fields of law. For a taste of the academic work a handful of my colleagues have published, please turn to the excerpts of recent scholarship by Professors Oren Bar-Gill, Rachel Barkow, Daniel Hulsebosch and Katrina Wyman, starting on page 65.

Throughout this magazine, you'll find stories that bring you up to date on campus activities, and showcase the accomplishments of our students, alumni and faculty, many of whom garnered medals, grants and other honors this year. There is much significant news, and a great deal to

celebrate. Enjoy the issue!

RICHARD REVESZ

The magazine of the Law School the magazine of the New York University school of law

12 What Price, Peace?

Mohamed ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04) runs the International Atomic Energy Agency, a multilateral organization whose mission is to safeguard the world against nuclear proliferation. ElBaradei, who won the 2005 Nobel Peace Prize, believes that, to forestall violence, the world's powers need to address

> human rights injustices as well as quality-of-life imbalances. "It's not just poverty per se, it's the sense of humiliation and injustice. When somebody feels humiliated," he says, "they just go bananas."

24 The Rules of the Game

At NYU, Civil Procedure is not just a basic requirement that first year students need to suffer through. The magnificent civ pro faculty is passionate about the administration of justice and is devoted to teaching procedure, which they regard as holding "the keys to the kingdom." A well-conceived case, say these professors, is like a chess match. Anyone for a game?

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Three professors are honored; alumni help bring humanitarian relief and a sense of order to Sudan; Congress calls on law professors for voting rights advice; Chinese judges (above, on the NYC subway) visit the NYU School of Law; and more.

44 Faculty Focus



Dean Richard Revesz has charged *The Law School* with one particular mission above all others: Choose one academic area each issue and focus on it so that readers will learn about a defining characteristic of this institution. During the first years of Revesz's deanship, we profiled the international, environmental and criminal areas; last year we zeroed in on philosophy and law. This year, civil procedure is under the microscope. Any objective body composed



of professors from our peer schools would certainly agree that we set the pace in all these subjects. To call attention to the latest news and developments in these outstanding specialties, we have marked relevant stories with the icons above.

86 Student Spotlight





36 Heads of the Class

The most contested area within the realm of civil procedure is mass harm litigation. How should a large group of injured parties seek redress? Is a trial the right way or is there a better forum? A dozen faculty and alumni shared their expertise on these complex issues in our roundtable discussion: How should justice be meted out?

102 Around the Law School



Highlights from this year's swirl of events included three Transatlantic Dialogues, with Supreme Court Justice Stephen Breyer and John Bruton of the E.U., among others;

a conference on presidential powers attended by political players with widely disparate views, ranging from Republican stalwart Viet Dinh to Clinton confidant Sidney Blumenthal to former Nixon counsel John Dean (above); a compelling lecture by Chief Justice Randall Shepard of the Indiana Supreme Court; and the third annual counterterrorism conference that gathered top decision-makers.

114 Alumni Almanac



The Law School launches a \$400 million capital campaign; Lester Pollack '57, chair of the Law School board, gives his name to a center; alumni honor Judge Betty Weinberg Ellerin '52; and Jennifer Dalven '95 and Monica Roa (LL.M. '03, above) protect women's rights. New York University

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Commencement and Convocation featured remarks by Carol Bellamy '68 and student speakers Alexander Dmitrenko (LL.M. '06) and Brandon Buskey '06; Supreme Court Justice Anthony Kennedy received an honorary LL.D.; Jenny Huang '06 (above) celebrated.

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Simon Chesterman is the faculty director of our new program with the National University of Singapore Faculty of Law. We interviewed the witty native Australian before he leaves town.

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Notes & Renderings

Bryan Stevenson Wins Martin Luther King Award



Professor Stevenson was honored during NYU's first annual MLK Celebration Week in January.

B aryan Stevenson, professor of clinical law, added two more awards to his already impressive collection this year when he took home NYU's first-ever Martin Luther King Jr. Humanitarian Award as well as its Distinguished Teaching Award.

Stevenson, who lists among his honors a MacArthur Foundation fellowship, the American Bar Association Wisdom Award for Public Service, the American Civil Liberties Union National Medal of Liberty and the American College of Trial Lawyers Award for Courageous Advocacy, teaches courses on racial justice and capital punishment as well as leading the headline-making Capital Defenders Clinic in Alabama. In January 2005, clinic client James Borden became the first Alabama death-row prisoner to have his sentence converted to life imprisonment due to mental retardation. "The clinic is the perfect nexus of legal training and education while helping defendants who are literally dying for representation," says Stevenson, who believes that "each of us is more than the worst thing we have done."

Stevenson is also the executive director of the nonprofit Equal Justice Initiative

of Alabama, which works on behalf of indigent defendants and prisoners, many on death row. The EJI has succeeded in obtaining relief in the form of new trials, reduced sentences or exoneration for more than 70 death-row prisoners in the past 15 years.

It was Stevenson's tireless advocacy that caught the attention of the Martin Luther King Jr. Humanitarian Award committee, said Allen McFarlane, assistant vice president for student diversity programs and services at NYU. He said that Stevenson "embod[ied] the work of Dr. King.... We want to recognize individuals in our own community, in our own backyard, who are doing great things related to social justice and diversity in our world today."

Stevenson was also one of three professors to receive the annual NYU Distinguished Teaching Award in May. The medal and \$5,000 grant recognize faculty who have contributed significantly to the intellectual life of the university. Said Vice Provost for Faculty Affairs E. Frances White: "The committee was especially impressed by Bryan's ability to inspire students to dedicate their lives to helping those marginalized in the criminal justice system."

Antiterrorism Expert Reflects at Center on Law and Security

The New York City Police Department's former deputy commissioner for counterterrorism has joined NYU's Center on Law and Security (CLS) as a distinguished fellow for the current school year. Michael Sheehan, who was the top counterterrorism official at the U.S. State Department as well as a member of the National Security Council under Presidents George H.W. Bush and Bill Clinton, resigned from the NYPD last May.

Sheehan has 33 years of experience in public service, beginning with his undergraduate studies at West Point; he then rose to the level of lieutenant colonel in the U.S. Army Special Forces. His counterterrorism career began in the 1990s, when after the bombings of U.S. embassies in East Africa he became the Department of State's ambassador-at-large for counterterrorism. He was also the assistant secretary-general in the Department of Peacekeeping Operations at the United Nations, where he was responsible for oversight of military and peacekeeping forces around the world.

The purpose of the fellows program is to allow leading counterterrorism officials to take a step back and reflect, to think about the intractable problems and consider new approaches. "It's time for me to go to a different level," Sheehan told the New York Times last May when his decision to come to NYU was made public. "And for the first time in my life, I'm going to be able to write and speak and enter the public policy discussion and hopefully bring a little added value to that discussion in a nonpartisan way." During his year at the CLS, Sheehan is planning to coedit with CLS Executive Director Karen Greenberg a publication called For the Record, which will present analyses of major security issues and policies, including port security, the Patriot Act's consequences and how to build the necessary infrastructure to defend against terrorism.



Answering the Call from Sudan



David Pressman, lower right, helped George Clooney and his father, Nick, interview Darfuri refugees on camera. Inset: Nathan Miller with members of the Blue Nile State Constitutional Committee in Southern Sudan.

hree Law School alums took action in Sudan this year: Nathan Miller '01 and Maya Steinitz (LL.M. '00) launched the nonprofit Rule of Law International (RoLI) to help the Sudanese develop a constitutional process, and David Pressman '04 drew media attention to the humanitarian crisis in Darfur, with the help of actor George Clooney and George's father, Nick.

When the Sudanese civil war ended last year, Miller, who had been working with the Sudanese People's Liberation Movement (SPLM) to create a rule of law program in Southern Sudan, saw an opportunity to help them in their post-peace agreement constitutions. That's when he started RoLI. "There was a desperate need for the people of Sudan to get legal consultation that they could trust," says Miller, the executive director. With Miller in Sudan, and Steinitz plus a 50-lawyer team from Latham & Watkins working pro bono in Manhattan, RoLI helped hammer out constitutional frameworks at the national, subnational and state levels.

Pressman had also been working in the region setting up rule of law programs for the U.N. He had listened to Darfuri victims' stories about their villages being pillaged and women being raped. "So many times I told these people that I would make their words heard," says Pressman, who grew up hearing his own family's stories of the Holocaust. Pressman had just returned to the United States and was organizing a speaking tour to talk about the plight of the Sudanese people when he got a call from Nick Clooney, a columnist at the Cincinnati Post. Clooney and his movie star son George had been unable to get into the region; they wanted to report firsthand on the three-year-old conflict at the Save Darfur rally on April 30 in Washington, D.C. By chance, the elder Clooney was chatting with a cousin, who told him about her nephew, a lawyer from NYU. "David is quite an accomplished young man," Clooney later wrote. "More than that, he is a person who gets things done. When others said 'no,' he said, 'If you really want to do this, I think I can find a way.""

The unlikely trio and a cameraman soon set off for Nairobi, Kenya. From there, they hopped a single-engine Cessna to Southern Sudan, where they spent the night in stifling hot huts crawling with tarantulas, then took another plane and also a Jeep across dirt roads to the Oure Cassoni Refugee Camp at the Chad-Darfur border to interview the refugees on camera.

When they returned home, the Clooneys spoke at the rally and appeared on CNN, *Oprah* and *Today*, to name a few media outlets. "We were able to use George's celebrity to propel these horrific stories into virtually every media market and hopefully into the American conscience," says Pressman. A long, arduous trip to fulfill his promise, but one that may lead to much-needed aid for the suffering Sudanese.

Nagel Gets a Sweet Slice of Mellon

homas Nagel received a Distinguished Achievement Award from the Andrew W. Mellon Foundation in December. The University Professor was one of four academics to win the award, which includes a three-year \$1.5 million grant to the scholar's university. With the funding, Nagel plans to pursue an interdisciplinary group study of the relationship between science and religion, as well as individual research into the political theory of global justice.

Nagel, who coteaches the Colloquium in Legal, Political and Social Philosophy with Professor Ronald Dworkin, has been a professor of philosophy at NYU since 1980. In 1986, he also became a professor of law, and, in 2002, University Professor. Nagel is the author of dozens of articles and 10 books, including one of his latest, The Myth of Ownership: Taxes and Justice, with Professor of Law and Philosophy Liam Murphy. "The Mellon award to Tom Nagel signals what everyone in the field already knows: that he is one of the Anglophone world's few most eminent and influential philosophers," said Dworkin. "He has no formal legal training, but he has become an intuitively skillful and imaginative lawyer and he has brought new sophistication to the study of legal philosophy and, indeed, of constitutional and international law. The Law School is extremely lucky to have him, not just to teach moral and political philosophy, but to carry forward the integration of law and the humanities. The Mellon funds will further enhance his power to do that."



Legal Paper Makes Waves— Even Before Publication

t's not every day that a law review article challenges a piece of constitutional orthodoxy so widely held that junior high school students can recite it. And it's even less common for law review articles to start generating discussion and controversy months before they are published.

The June *Harvard Law Review* featured an exception to those rules, a collaboration between Sudler Family Professor of Constitutional Law Richard Pildes and Professor Daryl Levinson of Harvard Law School called "Separation of Parties, Not Powers." It took aim at the conventional understanding of what is said to be the unique genius of the constitution: the checks and balances that are built into the



separation of powers. Ambition checking ambition, in James Madison's phrase, is said to be the very basis of the success of American democracy.

"The truth," Levinson and Pildes wrote in the timely, fresh and immensely readable article, "is closer to the opposite."

In an interview, Pildes explained that the article's goal was to cause readers to reexamine the things they thought they knew. "The starting point," he said, "is getting people to think more seriously about ideas, like 'separation of powers', that are repeated so often they become taken-for-granted mythologies, without asking any more whether these institutions actually operate in the way these stories lead us to unreflectively believe."

What the framers failed to envision, say Levinson and Pildes in their article, is how party politics can swamp the constitutional structure. When the same party controls both political branches, it is fantasy to think that Congress's institutional self-interest will be enough to act as a meaningful check

> on the president. A single party has controlled govern-

ment more often than not since 1832.

"Against this background," the article says, "it is odd to hear courts and constitutional scholars celebrating government 'accountability' as a particular virtue, or even potential virtue, of the Madisonian design."

Though the article was not formally published until June, it caught the attention of the legal academy in draft form. "It's a very good and important paper," said Cass Sunstein, a law professor at the University of Chicago. "It has a real insight that, certainly in the legal literature, is novel and fresh." He added that its thesis may in places be overstated, noting in particular that Senator Arlen Specter, the Republican chairman of the Judiciary Committee, has tried to protect Congressional power, though without notable success.

It is a mistake, the article says, to look to the courts for significant oversight of executive power when the political branches are controlled by a single party, as judges generally find presidential actions constitutional when they can be said to have been undertaken with Congressional authorization or, at least, silent acquiescence. Thus, the September 2001 Authorization for Use of Military Force was, the Supreme Court ruled in 2004, sufficient to justify military detentions. The administration relies on that same authorization in connection with its controversial surveillance program.

"Only during divided government," the authors write, "do courts have the independence to act as a meaningful check on national majorities. In short, strongly independent judicial review may be possible only when least necessary."

The article helps explain why Democrats are so eager to win back the House or Senate: Only an opposition party with subpoena power and similar oversight tools can truly act as a check on another branch. Indeed, among the reforms proposed in the article to compensate during periods of unified government is providing the minority party with such tools.

"Rather than blaming individual members of Congress for not playing their 'assigned' role of providing checks and balances and exhorting them to be more 'responsible," Pildes said, "we need to look at the legal and institutional context in which they act and focus on changing that in ways that enable more meaningful checks and balances to be exercised in actual practice."—Adam Liptak

Satterthwaite Calls for a Human Rights Response in Haiti

A ssistant Professor of Clinical Law Margaret Satterthwaite called for action in Haiti when she testified before the Inter-American Commission on Human Rights (IACHR), the human rights body of the Organization of American States (OAS), in Washington, D.C., on March 3, 2006. She highlighted the extreme poverty of Haitian citizens and their lack of basics, such as food, clean water, shelter and health care. Insisting that the deprivation of these essentials is a human rights matter, she urged the OAS to fulfill its legal obligations under its charter by assisting Haiti's suffering people. Satterthwaite and her project partner Loune Viaud, the director of a free medical facility in Haiti and the 2002 Robert F. Kennedy Memorial Human Rights Award winner, focused the IACHR's attention on Haiti's dire situation with the help of two students in the International Human Rights Clinic. Jordan Fletcher 'o6 and Swan Sallmard (LL.M. '06) prepared Satterthwaite's and Viaud's testimonies and coauthored the legal brief that was submitted to the IACHR. "The countless hours they put into constructing a compelling legal argument paid off when we arrived at the hearing room," says Satterthwaite, who earlier in her career worked as an investigator for the Haitian Truth and Justice Commission. As photos of patients were projected onto a screen, said Satterthwaite, Viaud explained that the right to health was being violated on a daily basis. When the hearing came to a close, Commissioner Clare Roberts of Antigua personally thanked the women for their testimony. "We are hopeful that our legal arguments, coupled with this human connection, will make a difference in the way the commission approaches the right to health in Haiti," Satterthwaite said.

Helping Worthy Students Get to the Starting Line

etting into law school is no small feat for even the most privileged students, who **J** even the most privileged care have ample resources for exam preparation courses and knowledgeable parents or paid consultants to explain the process. But for those at an economic disadvantage, higher education may seem impossibly out of reach. "My parents just didn't know how the system worked," says Carlos Siso '07, who was born in Venezuela and raised in Miami. "I was deciding where to go and figuring out what to do all by myself." The same was true for Damaris Hernández '07, who was raised by her non-English speaking mother in East New York. "I was the first in my family to go to college, and it was a road I traveled by myself," explains Hernández. "My mother worked long hours so she could give me every opportunity, but it wasn't the same as someone who has money."

Their difficulties motivated the two to smooth the way for others. Siso and Hernández partnered with the Princeton Review Foundation and the Law School to create TruePotential, a program that helps socioeconomically disadvantaged prospective law students in New York with every aspect of admissions, from test taking to essay writing to seeking financial aid.

"Education is about opportunity," said Dean Richard Revesz. "An endeavor like TruePotential is in keeping with the spirit of the NYU School of Law's mission to provide a platform for achievement."

Last spring, TruePotential held its pilot program at NYU. The Law School donated classroom space in Furman Hall, and paid the Princeton Review Foundation's subsidized course fee. Students endured the rigorous Princeton Review Hyperlearning LSAT preparation course, which provides more than 60 hours of classroom instruction, and six full-length practice LSAT exams. In addition, TruePotential students took résumé- and essay-writing workshops, and received insider perspectives on the admissions process from Siso, Hernández and Law School administrators like Assistant Dean for Admissions Kenneth Kleinrock.

To qualify for the TruePotential program, students must intend to take the following summer's LSAT and demonstrate significant financial constraints that prevent them from paying for an LSAT prep course—which can cost \$1,500. Other factors such as a prospective student's extracurricular activities, academic achievement and leadership potential are also taken into consideration for admission into the program.

Gabriel Zucker, a 27-year-old parent and a philosophy major at Columbia University, was a part of TruePotential's pilot class this past spring. Like many of his classmates, he wondered how he was going to balance his courseload and a 20-hour-perweek job, and find the time and money for an LSAT prep course. "When the spring semester of my junior year began, I felt what many law school applicants feel: dread," said Zucker.

But after taking part in TruePotential, Zucker's outlook brightened. "It hasn't been easy; I could never have done it without the dedication of Carlos and Damaris," he says. "The fact that they do this as full-time law students inspires me to work even harder."



With assistance from the Law School and the Princeton Review, Carlos Siso and Damaris Hernández, together at far left, launched TruePotential to help socioeconomically disadvantaged aspiring lawyers.



Aziz Huq Is Law School's Fourth Carnegie Scholar

For the fourth straight year, the Carnegie Corporation of New York has named a member of the Law School community a Carnegie Scholar. Joining Professors Noah Feldman, Stephen Holmes and Richard Pildes, Aziz Huq, a lawyer at NYU's Brennan Center for Justice, has been awarded a two-year grant of up to \$100,000 to study issues concerning Is-Iam and the modern world.

Huq's research involves a pressing question that has arisen in Western societies in the wake of 9/11-namely, how to deal with Islamic terrorist defendants in the criminal justice system while still respecting the constitutional ideals of free speech and religious accommodation. (A significant part of the project will entail examining trial transcripts to see how defendants' religious speech is used against them by government prosecutors.) Hug plans to look at this quandary in the larger context of the social policy problem: how to identify the small number of radicalized Muslims in Western countries while preventing further radicalization.

Huq, whose work includes litigating executive detention cases and studying the separation of powers, anticipates more access to multidisciplinary scholarship through the grant. In fact, at a gathering of Carnegie Scholars in July, he said he learned about the history and inception of electric torture, information that may prove useful in his research.

Patricia Rosenfield, the chair of the Carnegie Scholars Program, called Huq "a scholar with deep historical and legal understanding. His scholarship is unemotional and unbiased in its approach, and will result in a major contribution to understanding and in efforts to respond to today's most sensitive and important areas of counterterrorism."

Pentagon Admits Error in Targeting Students

ew would be surprised to learn that the Pentagon has been monitoring possible terrorist activity within the U.S. But many were outraged last December when MSNBC revealed that the Department of Defense's targets included a Law School student group that opposes the Solomon Amendment and the military's "Don't Ask, Don't Tell" policy, which bars service by openly gay and lesbian personnel.

According to the media report, OUTLaw, the NYU gay and lesbian law students organization, and other schools' gay student groups had been flagged as potential threats to domestic security. In April, following a series of Freedom of Information Act requests from the Servicemembers Legal Defense Network (SLDN), which provides legal assistance to gays and lesbians in the armed services, and inquiries on behalf of NYU by Senators Charles Schumer and Hillary Clinton and Congressman Jerrold Nadler, Acting Deputy Under Secretary of Defense Robert Rogalski admitted that the DoD had erroneously included reports of these student groups' antimilitary protests in their database of "suspicious incidents," and said that steps were being taken to prevent a recurrence.

"These [government reports] are both distressing and disappointing," said Dean



Richard Revesz in a statement to the NYU community. "They are distressing in that they reveal disrespect for the traditional role that universities, and law schools in particular, play in providing an environment for critical thought and robust discussion of socially important issues. Government surveillance of those involved in peaceful and constitutionally protected activities...can only chill the conversation that universities are obligated to foster. The reports are disappointing because they reveal a remarkable misallocation of our nation's resources. At a time when security concerns are paramount in the minds of all Americans, especially New Yorkers who have suffered the consequences of security lapses, we are disheartened to discover that our officials deem it appropriate to dedicate their scarce resources to the surveillance of students whose objective is to increase opportunities for capable men and women to serve their country."

Narula Focuses International Attention on the Plight of Dalits

t's hard to pinpoint the exact moment when Assistant Professor of Clinical Law Smita Narula became a leading advocate in the fight against caste discrimination in Nepal. She certainly took some big



Smita Narula at the report briefing in New York.

steps toward it in August 2005, when she cowrote "The Missing Piece of the Puzzle: Caste Discrimination and the Conflict in Nepal," published by NYU's Center for Human Rights and Global Justice (CHRGJ).

The report, which was then delivered to the United Nations' Committee Against Torture in Geneva, called attention to acts of discrimination, purposeful economic marginalization and physical torture committed against "lower-caste" Dalits. These indigenous Nepalese citizens, says Narula, have been "the invisible victims" in an unchecked power struggle—political pawns suffering apartheid-like segregation amidst the long, bloody conflict between the Maoist insurgency and the Nepalese monarchy.

The U.N. committee responded strongly to Narula's report, adopting its proposals and calling on Nepal to address the Dalits' plight and ensure that caste is no longer a basis for pervasive abuse.

In February 2006, Ian Martin, the head of the Office of the High Commissioner of Human Rights (OHCHR) in Nepal, cited the report at the European Parliament Subcommittee on Human Rights Exchange of Views on Nepal. A month later in Kathmandu, Martin went a step further; in a speech he gave on the International Day for the Elimination of Racial Discrimination, he heavily referenced and endorsed the center's report, and publicly announced his promise to "seek to focus the attention of the mechanisms of the U.N. human rights system as a whole to support the rights of Dalits and ethnic minorities in Nepal."

Narula and the CHRGJ are now inextricably entwined in the Nepalese issue. The OHCHR regularly seeks her expertise in dealing with discrimination in Nepal, and the center will closely monitor the drafting of an interim constitution by a drafting committee that was formed in the wake of King Gyanendra's abdication last April. Narula and the CHRGJ have made it a top priority to ensure that the elimination of caste discrimination takes center stage in the wording (and application) of Nepal's interim constitution.

Two Degrees of Collaboration

his year, New York University School of Law announced an exciting new dualdegree program in conjunction with the National University of Singapore Faculty of Law (NUS). The international curriculum will be offered in Singapore, and the schools will welcome their first joint class of 75 to 100 students in May. Simon Chesterman, until recently the director of NYU School of Law's Institute for International Law and Justice, will be the resident faculty director of the groundbreaking program.

Designed to attract students from all over the world, not just Asia, the program will combine the rigorous academic education for which NYU is known with a program that embraces what NYU President John Sexton calls the idea of "global connectedness and promise."

"For NYU School of Law this is a natural step," said Dean Richard Revesz. "Over a decade ago, we recognized that important changes in the way law was being practiced required changes in the way it was taught. This led to the creation of our highly successful Hauser Global Law School Program. Our partnership with NUS takes that insight to the next level."

Students will earn a Master of Laws (LL.M.) degree in law and the global economy from NYU, with optional concentrations in either U.S. and Asian business and trade law, or justice and human rights. An expanded curriculum will allow them also to earn an LL.M. from NUS. Courses will be taught by NYU law faculty in residence at NUS as well as by NYU global faculty and members of the NUS faculty.

In addition to their classes, students will have the opportunity to complete internships with Singapore law firms, corporations, government entities or NGOs in the region. They may also follow courses in Shanghai through a joint program of NUS and East China University of Politics and Law.

"We expect the new program to attract two broad categories of applicants," said Chair and Faculty Director of NYU's Hauser Global Law School Program Professor Joseph Weiler. "The first is Asian students who hope to acquire proficiency in American law and benefit from the distinct methodology and style of American legal education, while also developing a comparative understanding of Asian law. The second is students from the rest of the world who recognize the importance of Asia and want to combine the rigor of an American law degree whilst simultaneously acquiring proficiency in Asian law and institutions."

"This relationship brings together the top international law faculty in the United States and Asia's Global Law School," said Chesterman. "It's tremendously exciting, not only for the students, but also for the two faculties." NUS Faculty of Law Dean Tan Cheng Han agreed, saying, "We welcome the NYU School of Law to Singapore."

Out of the Shadows



A groundbreaking pilot study by the New York University School of Law's Center for Community Problem Solving (CCPS) and the Center for Urban Epidemiologic Studies at the New York Academy of Medicine revealed unsettling information about the health, economic situation and social status of New York's Mexican immigrant population.

Five million of the 10 million Mexican immigrants in the United States—the largest immigrant group in the nation—are undocumented, and their lives in the shadows compelled the CCPS to conduct this unique, all-inclusive analysis. Interviewers talked with documented and undocumented Mexicans in all five boroughs of New York. They asked detailed questions about the immigrants' personal experiences with health care, the criminal justice system, social networks, substance abuse and employment.

Some of the survey's findings—which were published last November in New York City's two major daily Spanish language newspapers, *HOY* and *El Diario*—include: More than 44 percent of the interviewees have lived in New York for less than four years. Nearly 85 percent did not have health insurance and almost 27 percent had gone hungry during the last six months because they couldn't afford food. Arijit Nandi, a doctoral student at the Johns Hopkins Bloomberg School of Pub-

Ic Health who helped analyze the data, notes that the health of immigrants and of the general population are likely to be inextricably mixed. "It makes a compelling argument for learning more about the public health issues faced by undocumented individuals," says Nandi. "And for addressing them."

Faculty Director of the Singapore Program Simon Chesterman, left, with National University of Singapore Faculty of Law Dean Tan Cheng Han.

Chinese Judges Take U.S. Courts Under Consideration



Top: Research Scholar Mary Holland, second from left, led the visiting judges on their trip to Centre Street. Judges Huang Lihua, left, Zhang Min, center, and Wang Jianping, standing right, take the A train.

t wasn't the distinctively New York experience of careening and sweltering aboard the city's famed subways that got the visiting Chinese judges excited when they visited in June; they were focused on the goings-on at the New York State Supreme Court. This year's attendees of the Dwight D. Opperman Institute of Judicial Administration's Training and Education Program for the Chinese Judiciary were keyed up to hear about how the state judicial process works, and explore the differences between jury and judge trials.

"The visiting judges were interested in the ways American courts function, how they relate to the executive branch and how they deal with administrative problems," said Russell D. Niles Professor of Law Oscar Chase, codirector of the institute.

When asked if American judges should have final say in trials, the Chinese judges had varying opinions. Some, like Ouyang Zhenyuan, a senior judge of the Fourth Civil and Commercial Tribunal of the High People's Court, felt that jury trials protected judges when sentences were handed down. Yu Chunsheng, president of the Xinjiang Wulumuqi Shayibake District Court, disagreed: "It's hard to be an American judge. You have far more experience and yet you have to abide by a jury's verdict."

The judges also had the opportunity to meet with the Honorable Doris Ling-Cohan '79 and hear about her administrative initiatives to benefit the largely Asian community in Lower Manhattan. One program that impressed the judges was the free book available at the court, cowritten in English and Mandarin by Ling-Cohan, which explains New York State court procedures.

Current events also made for lively discussion. "On the last day of the program, we discussed the *Hamdan* case in which the Supreme Court held that the president's powers over the Guantánamo detainees were limited by the Geneva Conventions and Congressional action," said Chase. "I found that the Chinese judges were as divided about the outcome as the justices of the Supreme Court."

Theodor Meron

Meron Medals

ast March the American Society of International Law (ASIL), an organization supporting the study and promotion of international law, honored Judge Theodor Meron, the Charles L. Denison Professor of Law Emeritus and Judicial Fellow at NYU, with its Manley O. Hudson Medal, given for "exceptional contributions to scholarship and achievement in international law." Meron, the former president and a current appeals judge of the International Criminal Tribunal for the Former Yugoslavia and an expert in international humanitarian law and international criminal law, served as a U.S. delegate to the Rome Conference on the Establishment of an International Criminal Court.

The society presented the medal at its centennial meeting, after Meron delivered an address that concluded that tribunals "have helped to instill the idea that justice, not retribution or impunity, should be the response to horrific crimes." W. Michael Reisman, the Myres S. McDougal Professor of International Law at Yale Law School and chairman of the ASIL honors committee, lauded Meron "for his contributions as a teacher over many decades, as a creative scholar, especially in the field of humanitarian law, for his scholarship in the humanities, for his work for the U.S. government as counselor to the Department of State, for his leadership of the Former Yugoslav Tribunal over which he presided and for his contribution to the American Society of International Law, as editor-in-chief of the American Journal of International Law." Meron, he said, would have qualified for the award for any one of these accomplishments.

Law Professors Testify on Voting Rights Act

n separate appearances in May, Law School Professors Samuel Issacharoff and Richard Pildes told the Senate Judiciary Committee that a controversial portion of the Voting Rights Act designed to protect the ability of minorities to have a voice in our government might no longer be necessary.

In July, however, Congress voted to renew the measure, called Section 5, which was enacted at the height of the civil rights movement in 1965—several months after three voting rights activists were killed in Mississippi and after state and local police in the South attacked 600 civil rights protesters on a march from Selma to Montgomery, Alabama.

Last renewed in 1982, Section 5 requires some areas of the country—mostly Southern states—to obtain approval (called preclearance) from the Justice Department before any changes to election practices or procedures can go into effect.

Given the vast changes in U.S. society in the 41 years since the law was enacted, Section 5 doesn't necessarily make sense in its current form, Issacharoff told the panel on May 9. He urged legislators to ease some of the procedural requirements currently faced by jurisdictions covered by the provision. He also warned that as the political parties vie for voters, Section 5 can be misused by officials basing decisions on party politics. "Unfortunately," he said, "the emergence of real bipartisan competition in covered jurisdictions has brought with it concerns of preclearance objections motivated by political gain, particularly in the highly contested area of redistricting."

A week later, Pildes raised some of the same points, and also criticized a proposal



Senators Arlen Specter, Patrick Leahy, Edward Kennedy, Joseph Biden Jr., Herbert Kohl and Dianne Feinstein.

to revise the Section 5 language to repudiate the 2003 U.S. Supreme Court decision in *Georgia v. Ashcroft.* In that case, the Supreme Court said that a redistricting in Georgia should have been allowed, even though the Justice Department declined to approve the change.

"Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions. Yet the Act would have imposed on them more racially homogenous constituencies," he testified. "And here were black legislators, not demanding safer sinecures for themselves, as officeholders typically do, but taking risks, cutting deals and exercising political agency to forge a winning coalition. Yet the Act would have denied these political actors the autonomy to make the hard choices at issue, even with partisan control of state government at stake."

Issacharoff's appearance was his second before the committee this year. In January, he testified on a somewhat related matter during the confirmation hearings for Samuel Alito. In 1985, the nominee had written on a job application that he disagreed with Supreme Court decisions in the 1960s about reapportionment, and the idea that states had to structure government to implement the "one-person, one-vote" principle.

"That such doubts about the reapportionment cases should reappear on a job application in the 1980s is at least a curiosity," Issacharoff testified. While he didn't recommend rejecting Alito, he urged the Senate to be sure that Supreme Court justices are committed to protecting the right to vote. "Before confirming any nominee to the Supreme Court," he testified, "the Senate of the United States should be able to conclude with confidence that, regardless how a nominee may vote on any given case, there is no doubt that he or she will assume the responsibility of protecting the integrity of our democratic processes." ■

The Council on Foreign Relations Welcomes Noah Feldman

oah Feldman, the Cecelia Goetz Professor of Law, joined the Council on Foreign Relations as an adjunct senior fellow in January. Feldman, who earned a doctorate in Islamic political thought from Oxford University and who has served as a senior constitutional adviser to the Coalition Provisional Authority during the Iraqi constitutional process, has since participated in several discussions at the Council on such topics as the Iraqi civilian perspective and the proper understanding of Shiism. "The Council is an ideal and unique venue for meeting with and influencing policymakers," said Feldman, for whom democratization

in the Middle East is a primary focus of study. James M. Lindsay, vice president and director of studies at the Council, said the organization was "thrilled" that Feldman had joined them, adding: "He is one of America's leading scholars on Islamic thought. His appointment has deepened the Council's contribution to the debate on Iraq and the future of democracy in the region."

Last December, shortly before joining the Council, Feldman was also named a contributing writer for the *New York Times Magazine*. His recent articles for that publication have examined the prospects for stability in Iraq, the legality of the National Security Agency's domestic spying program and the limits of presidential power.



IN THE EYE OF THE STORM: Mohamed ElBaradei briefs the press after a closed-door session with President George W. Bush in 2004.

10

WHAT PRICE, PEAGE

Nonproliferation treaties aren't worth the paper they're printed on unless someone holds signatory nations accountable; the head of the IAEA, Mohamed ElBaradei (LL.M. '71, J.S.D. '74), collects the dues.

If one were to try to plot the point at the middle of the major international confrontations of the last few years, the result would probably be a spare, elegantly appointed room atop a curved high-rise building on the outskirts of Vienna. It is the office of Mohamed ElBaradei,

the director general of the International Atomic Energy Agency (IAEA), and last March, ElBaradei spoke there about his efforts to direct the way to a peaceful settlement of the world's most dangerous brewing conflict. "Everybody recognizes that Iran can only be resolved when all the concerned parties sit together, face to face, and have a negotiated settlement. There is no military solution," he has long insisted, "even if you go through sanctions. An imposed solution is not a durable solution." The world's newest Nobel Peace Prize laureate has been frustrated with the Iranian government's refusal to come clean about all of its nuclear activities and worried about the war drums that have beaten intermittently in Washington, especially earlier this year. There appears to be no doubt whatsoever in ElBaradei's mind: "We have reached a point," he says, "where there are no other options but diplomacy."

With his oval-rimmed glasses, dark suit and trim moustache, ElBaradei, who earned an LL.M. in 1971 and a J.S.D. in inter-

national law from NYU in 1974, has the scholarly-yetstylish look of someone you might meet browsing off the Ring in one of Vienna's art galleries or *antiquariate*. Spot him on the street in his overcoat and white scarf, and he is the picture of urbanity. It's easy to imagine him descending the steps from the former Hapsburg capital's renowned *Oper* into a snowy Viennese night. It's a bit harder to imagine him hectoring and cajoling Iran's theocrats into permitting more intrusive inspections of their facilities—or trying to fend off the demands of the United States and its European allies to escalate the matter by bringing their complaints to the United Nations Security Council. But that is precisely what has been occupying his time lately. And as he knows well, the stakes could hardly be higher: At issue is not only the question of war and peace between America and Iran but also the future of the global nuclear nonproliferation regime. Indeed, the viability of the current system of multilateral organizations that mediate among almost 200 nations and attend to the most challenging problems of the age hangs in the balance.

In early June, the ElBaradei view about how to deal with Iran received support from an unexpected quarter: the administration of President George W. Bush. In a rare reversal of a long-held policy, Bush okayed a new U.S.-European initiative that extended the promise to Iran of direct negotiations with the United States and a package of concessions if Tehran would cease its uraniumenrichment program, which Washington and some of its allies believe is aimed at giving Iran a nuclear weapon. (Until the spring

has improved the enrichment process and even produced fissile material for weapons. After Tehran announced that there would be no quick reply forthcoming, Russia and China expressed their growing displeasure with Tehran's foot-dragging by joining the U.S. and Europe in agreeing to seek a U.N. Security Council resolution ordering Iran to freeze some nuclear activities-or face sanctions. On July 31, against the backdrop of new hostilities between Hezbollah and Israel, the Security Council pushed again for some sign of cooperation, calling for Iran to cease its enrichment work by September. This elicited a defiant response from Tehran, which threatened to expand its nuclear program and perhaps cut off oil exports. ElBaradei's belief in the necessity of diplomacy, though, is unshakeable. "There is no other way," he argues. While ElBaradei understands that diplomacy can fail, he

"If I look at Iraq as an alternative, all I can say is, we definitely should have a better system to settle our differences.... We clearly have a lot to learn about how to live in a so-called civilized society."

of 2005, when it began to back a European effort, Washington had maintained that offering carrots of any kind would be a reward for bad behavior.) For ElBaradei, this turn of events came as welcome news and something of a vindication. "It is absolutely the right decision, and I've been saying that for more than two years," he says. "The new initiative is quite good.... [It] has a lot of meat, which offers the option of normalizing with Europe and the U.S. and could have major implications for security in the Middle East. It is a few years overdue."

Even so, the success of the new proposal is far from guaranteed. In early July, Iran had declined to respond to the initiative, saying it would not have an answer until late August, angering the Western leaders who demanded action sooner. Many observers have taken such behavior as another indication that the Iranian government is determined to stall and postpone any talks until it remains hopeful that the parties will negotiate, even if only because his experience on that score has been searing. "If I look at Iraq as an alternative, all I can say is we definitely should have a better system to settle our differences," he observes. "If I read the figures that 120,000 civilians have died in the Iraq conflict, aside from the hundreds of thousands who died because of the 'dumb sanctions'"—he shakes his head and concludes— "we clearly have a lot to learn about how to live in a so-called civilized society."

he crisis ElBaradei is trying to manage has long been dreaded. In 1963, President John F. Kennedy warned that as many as 25 nations might acquire nuclear weapons by the 1970s. That nightmare scenario never materialized. In fact, for a time, the global nonproliferation effort could count more successes than failures. A passel of countries, including Argentina, Brazil, South Africa, Libya, South Korea and Taiwan, have pursued nuclear weapons programs and then thought better of it. After the collapse of the Soviet Union, the nuclear-armed states that emerged from the wreckage-Ukraine, Kazakhstan and Belarus-agreed to turn over to Russia the weapons left in their territory. Beyond the countries whose possession of the bomb is recognized by international law in the form of the Nuclear Non-Proliferation Treaty of 1970 (NPT)-the United States, Russia (as the successor state to the Soviet Union), China, Britain and France-only India, Pakistan and Israel have developed nuclear weapons in the 40-plus years following Kennedy's prophecy.

In recent years, however, the successes have slowed to a trickle, and the danger of a cascade of nuclearizing countries appears more imminent than ever. The biggest gun of all pointed at the nonproliferation regime may well be Iran. For almost two decades, the Islamic Republic's effort to develop nuclear energy has raised concerns in the West, where policymakers have long asked why a country afloat in oil needs to build reactors. The fears were confirmed when an Iranian dissident group announced in August 2002 that Iran was building two secret nuclear facilities, one for enriching uranium and another for making heavy water, which would be used for producing $plutonium. An \, IAEA \, investigation \, confirmed$ that Iran had been conducting clandestine activities, and thereafter began several rounds of high-level diplomacy, led by Britain, France and Germany (the "EU-3"), while ElBaradei worked at the IAEA to persuade Iran to give up the program.

What has made the confrontation so vexing is the loophole at the heart of the existing nonproliferation language: Uranium enrichment is not illegal per se under the NPT. Signatories, such as Iran, are permitted to have, in technical parlance, the nuclear fuel cycle for the purpose of energy generation. The uranium used in reactors needs to be enriched until the level of the fissile isotope, U-235, is about 4 percent. The problem is that the same technology can be used to make weapons-grade (roughly 90 percent U-235) uranium.

As one Western diplomat who is involved in the politicking over Iran and, like most officials, will speak only on the condition of anonymity, explains, "What worries us is not diversion from a safeguarded plant but mastering the techniques at a safeguarded plant that leads to the creation of a clandestine plant." Despite what the NPT says, as this diplomat puts it, "Good sense and legal obligation are in conflict."



NOBEL NEWS: Mohamed ElBaradei at home with his wife, Aida, and daughter, Laila, on the day he won the peace prize.

What ultimately makes the issue so freighted is the widely held belief that Iran represents a tipping point. North Korea's acquisition of a nuclear capability set off loud alarms beginning in the 1990s, but the consequences of its breakthrough were seen as limited compared with what might happen if Iran builds a nuclear arsenal. The reason is that North Korea is seen as a deadend regime with few ambitions beyond its own survival.

Iranian acquisition of nuclear weapons, on the other hand, would send shock waves through one of the world's most economically vital and politically volatile regions. Imagine the Balkans around 1914, the global powder keg-only now the gunpowder has been replaced by highly enriched uranium and plutonium-and you have an idea of one potential outcome of the Iran crisis. Imagine another American military intervention in the Persian Gulf on the heels of the debacle in Iraq (even though most strategists speak of a sustained air campaign and not the commitment of ground forces) with the attendant upheaval in the area and throughout the Muslim world, and you have another. Mohamed ElBaradei has plenty to worry about.

ith so much riding on his work, it's remarkable how little attention ElBaradei has received. Scan Nexis and you will find no full-scale profiles of him in English—indeed, there are few

that are more in-depth than the short one on the IAEA Web site. But then he is somewhat unusual as a public figure. Animated and voluble in conversation, but averse to the spotlight, ElBaradei is a man who would prefer to be at home in the evenings plowing through piles of work in the company of his wife, Aida-who must have been Vienna's most elegant kindergarten teacher until her recent retirement-instead of taking part in the never-ending roundelay of Viennese diplomatic receptions. His aides seem used to defending him against the charge that he is aloof. "People sometimes think he's arrogant," says Tariq Rauf, a senior IAEA adviser and member of the ElBaradei kitchen cabinet, "but it's more that he's shy. He's actually a very warm person."

He is a genuinely devoted family man a fact universally cited by critics and friends alike—who delights in spending time with his daughter, Laila, who is a lawyer in London, and his son, Mostafa, who works in that same city as a production engineer at CNN. Although ElBaradei travels relentlessly, he sees the two of them frequently, and they are always in touch. "We speak almost every day or every other day," Laila says. "He's learned how to text message, and he sends me great one-liners. He has a great sense of humor and I've always been sorry he didn't have a job where he could use his sense of humor." Through one crisis after another, family has been ElBaradei's refuge. Laila recounts, "No matter how busy my dad is, he always finds time for the boring minutiae in my life. I'm getting married in September and he's interested in what color the flowers should be and whether we should have a band or a D.J."

The absence of press coverage may also have something to do with the instinctive belief by many in the media that an international civil servant untainted by scandal who is devoting his efforts to nuclear disarmament must be a saint of sorts. The suspicion, therefore, as George Orwell wrote about Mahatma Gandhi, is that ElBaradei would evoke "aesthetic distaste" in person. But ElBaradei is not a saint. He is a likable, worldly man who is anything but austere.



GIVE PEACE A CHANCE: Professor Thomas Franck, front row, fourth from the left, in 1972, with international fellows including Mohamed ElBaradei, in the far right corner, and Antoine van Dongen, front row, second from the left.

ohamed ElBaradei was born on June 17, 1942, in Cairo—a dangerous time and place. Although Egypt was nominally independent, it still was dominated by Britain and, at that moment, Nazi troops under General Erwin Rommel were menacing from the west. The First Battle of El Alamein occurred just a few weeks after ElBaradei's birth, halting the German advance into Egypt outside of Alexandria. He came of age in the era of Gamal Abdel Nasser, the Egyptian leader who cut the cord with Britain—a charismatic champion of anticolonialism, Pan-Arabism and the rights of the developing world.

ElBaradei comes from a family dominated by lawyers. Among the most distinguished were his maternal grandfather, Ali Haider Hegazi, who sat on Egypt's Supreme Court, and his father, Mostafa ElBaradei, who rose to become president of the Egyptian Bar Association. ElBaradei enjoyed a youth of privilege in the clubs of Cairo and vacation homes of Alexandria, where the wealthiest Cairenes had their retreats. Yet even his father ran afoul of Nasser in 1961 by calling for democracy and a free press. The elder ElBaradei was harassed for his opinions, though he was later rehabilitated and recognized as a major figure of his era.

ElBaradei graduated from the University of Cairo in 1962 with a degree in law and joined the Egyptian foreign service, for which he was posted to the U.N. mission in New York. There he took advantage of a part-time master's program that the NYU School of Law offered and studied under Professor Thomas Franck, now the Murry and Ida Becker Professor of Law Emeritus. Eventually, during the early 1970s, he took leave from his job to work for his J.S.D. in international law.

Franck, who is still close to his former student, remembers him as being "very much as he is today...cautious, levelheaded, sound, consciously unexciting—above all, sensible, moderate." Anti-Zionism, of course, was a core tenet of Nasserism, and while ElBaradei was in New York, Egypt and Israel fought two wars. Still, the young Egyptian wasn't a prisoner either to national sentiment or to his profession as an Arab diplo-

mat. As Franck recalls, "His view was not your basic view of Israel. He pretty well knew the fact that Israel existed and that was not going to change. He was for finding some modus vivendi. He was always far more than an Egyptian studying in the United States, and he never presented the case like an Egyptian official." A fellow student from ElBaradei's early days in New York and now a lifelong friend, Antoine van Dongen (M.C.J. '71, LL.M. '72) recalls that the future IAEA director general "could be totally frolicky and asinine, as we all could be, and then be totally serious in debate and hold his own in conversation." Van Dongen, who is the Netherlands' ambassador to Sweden, also saw a trait in ElBaradei that has become a hallmark of his career: "If he thought he was right, then he really thought he was right."

If ElBaradei's temperament was already formed by the time he reached New York City, he still had a powerful desire to broaden his horizons. The 15 years he spent (with some interruptions) in the city were what he calls "really the formative years." He bought a subscription to the opera, taught himself about modern art—for which he retains a passion—and became a diehard fan of both the Yankees and the Knicks. Just the thought of that period puts a charge in his voice. "I still vividly remember watching at the dorm when the Knicks won the 1973 world championship...Earl the Pearl [Monroe], [Walt] Frazier and Dave DeBusschere!" he exclaims before a tone of wistful exasperation creeps in, one known to Knicks fans everywhere who have been waiting for a repeat of that miracle. "And I have been following them from abroad for the last 33 years."

Longtime friends and close aides testify to the deep imprint that New York made. His speechwriter, an American, Laban Coblentz, observes that to this day ElBaradei "peppers his speech with Americanisms like 'step up to the plate' and 'full-court press.'" New York did more than give ElBaradei a new set of interests, though. "This was the time of the counterculture," he recalls, "and the Village was really the hub of everything that was happening." Although cosmopolitan by Egyptian standards, ElBaradei was confronted with a variety that was overwhelming and exhilarating. "New York," he says he came to recognize, "is this microcosm of the world; it is the melting pot of every nationality of every race. You realize that we are one human family. I came to realize that living in New York."

After he finished his doctorate, ElBaradei was posted by the Egyptian foreign service to its mission in Geneva, where he continued to work on the multilateral issues handled by the various U.N. agencies there. From 1974 to 1978, he served as a special assistant to Egyptian Foreign Minister Ismail Fahmy and subsequently worked with Boutros Boutros-Ghali, who later became U.N. secretary-general. In 1980, the connection ElBaradei had forged with NYU and, in particular, with Thomas Franck proved fortuitous for the rising diplomat. The U.N. asked Franck to lead its Institute for Training and Research (UNITAR), an agency that, despite its name, undertook internal audits and evaluations of U.N. programs. Franck made a condition of his hiring that he be able to bring along ElBaradei, and with that the Egyptian returned to New York and joined the international civil service. During this period, between 1981 and 1987, he was also an adjunct professor at the NYU School of Law. He eventually came to the attention of Hans Blix, then the new director general of the IAEA, who hired ElBaradei to open the Vienna-based organization's office in New York in 1984. At the IAEA, he flourished, moving to headquarters as chief of the legal division in 1987. He later became head of external relations-essentially the agency's foreign minister-responsible for overseeing

contact with the 100 or so member nations.

ElBaradei's ascent to the top job at the IAEA provides one of the more comic episodes in the often-delicate apportionment of desirable spots in the international civil service, though none of the missteps was his. In the mid-1990s, it became clear that Blix, a legendary leader of the IAEA, would step down after the completion of his fourth term, and, unusually, no country stepped forward with a strong nominee.

Washington's ambassador to the IAEA at that time was John Ritch, a highly regarded envoy who decided that it was unwise to leave the succession to chance. As he recalls the story, Ritch, now director general of the World Nuclear Association, which promotes the peaceful use of nuclear energy, felt at the time that the opening at the top provided an opportunity to put a capable man in the job and send a valuable message of goodwill to the developing world. The IAEA had been run by Swedes for 36 of its 40 years (the first director, who served a single term, was former U.S. Congressman Sterling Cole). Ritch, who was a friend of ElBaradei's, recalls, "Mohamed combined affability, experience and a Western orientation with a high sen-

Shaker, however, was viewed as exactly the kind of person the U.S. did not wanta contentious proponent of Third World causes who, it was felt, would not provide the necessary leadership. In Washington, he became known as the "other Mohamed," and a delicate dance ensued to persuade Cairo that an Egyptian could indeed become the IAEA's director general, just not the one the Egyptian president wanted. The board of the IAEA held an informal vote, Shaker was turned down and ElBaradei was elected. "Nonetheless, handing this job to an Egyptian was a big step. Had Mohamed not been in Vienna, had he not had the support of the American ambassador and a totally Western persona, he never would have been considered," says Ritch. For all that made him appealing to the U.S., however, ElBaradei has been nobody's puppet, and his independence has at times made him the target of sharp American criticism.

The role of the organization ElBaradei inherited has shifted considerably during its existence. The IAEA grew out of the Atoms for Peace initiative that President Dwight D. Eisenhower unveiled at the U.N. in 1953. The core idea was that the power of the atom

"The Village was really the hub of everything that was happening—the counterculture. Living in New York, I realized that we are one human family."

sitivity to the developing world's perspective." He was, in Ritch's view, the complete package because, he says, "there is always a chasm between developing countries and developed countries, with the former putting a lot more emphasis on receiving assistance and the latter wanting to focus on nonproliferation issues. ElBaradei, with his nonproliferation credentials and Western perspective, seemed a good person to bridge the gap."

At this point, behind-the-scenes diplomacy turned into a high-level game of telephone. Word reached Cairo that an Egyptian could become director general, and President Hosni Mubarak decided to nominate a personal favorite of his, Mohamed Shaker, who would later serve as Egyptian ambassador to the U.K. offered fabulous promise in terms of cheap energy, and the U.S. and others who had the technology would share it with those who wanted it, provided they forswore the development of atomic weapons. The IAEA, which was born four years later, was envisioned as the agency that would regulate this bargain.

As time went on, however, the agency's role as middleman in the transfer of peaceful nuclear technology did not develop as quickly as its role as global nuclear cop, which was enshrined in the Nuclear Non-Proliferation Treaty. The treaty provided that the IAEA could inspect a signatory's nuclear facilities, but only those the signatory declared, leaving open the possibility of clandestine facilities. The inadequacy of that arrangement became clear after the 1991 Gulf War, when it was revealed that Saddam Hussein's nuclear program had been alarmingly close to giving him the bomb he coveted.

In the years since, the IAEA has added an "additional protocol" to its earlier safeguards agreements that gives the organization's inspectors enhanced access to nuclear facilities. Thus far, 107 countries have signed the protocol, but only 74 have ratified it. (In late 2005, after the IAEA rebuked Iran for not cooperating sufficiently with inspections, Tehran announced that it would no longer act as if bound by the protocol, which it had signed but not ratified.) Efforts to strengthen the nonproliferation regime also failed at the latest five-year review conference of the NPT, which was held in New York in May 2005.

If events have conspired to make the nonproliferation regime look more like a leaky and possibly sinking ship, ElBaradei, like his predecessor Blix, has done an exceptional job of keeping the pumps operating and the vessel afloat. Part of his success has been the result of his passionate belief in multilateral institutions and their ability to deliver fairness in international politics. He explains, "The whole concept of multilateral institutions is that you sit together and cut a deal that is fair and equitable to everybody You never get your way 100 percent and I don't think in any area now any one country can get 100 percent.... One-hundred-percent security for one country is 100 percent insecurity for another, so you just can't have it." In this regard, ElBaradei is a descendant of the dedicated international civil servants who worked in the heroic age of the U.N., such as Ralph Bunche and the director general's own hero, Dag Hammarskjöld. One American who has long had dealings with ElBaradei sums it up by saying, "He sees himself more as a representative of the nonproliferation regime and international diplomacy."

Passion and high-mindedness, of course, are only part of the equation. Another key has been maintaining the agency's reputation. According to David Waller, deputy director of the IAEA, who is the highestranking American at the agency and was put forward for his position by President George H.W. Bush after serving in the Reagan administration, ElBaradei "believes credibility is the lifeblood of this organization, and when we lose that, we're finished."

He has preserved that credibility in several ways. The first is by running an organization whose ethical standards have never been challenged. While the rest of the U.N. system has weathered a series of debilitating crises, including the corruption of the Oil-for-Food program in Iraq, the IAEA has been scandal-free and is regarded as the jewel in the crown of the network of international organizations. Another is by upholding the original vision at the heart of the NPT. That is, he has continued to call for those NPT signatories that have nuclear weapons to adhere to the treaty's "bargain," which requires them to reduce their arsenals and pursue the abolition of nuclear weapons, and in return, states that do not possess the weapons already, don't develop them.

Although the political elites of the nuclear powers have long rolled their collective eyes at this quid pro quo, ElBaradei has never tired of invoking it and prodding the countries that pay much of his agency's budget-and provide it with a large amount of the intelligence that is essential to its work-to do their bit. At times he has voiced this in an acid tone, likening the nuclearweapons states to those who "continue to dangle a cigarette from their mouth and tell everybody else not to smoke." In particular, recent moves in the United States to develop a new generation of nuclear warheads have elicited his outrage. "How can the U.S., on the one hand, say every country should give up their nuclear weapons and on the other develop these bunker-buster mininukes?" he asks.

inally, ElBaradei has maintained the standing of the IAEA by refusing to bend before the powerful-or to shy away from telling them unwelcome truths, as he did during the run-up to the Iraq war. This characteristic of the IAEA director general only became visible midway through his tenure, after the Bush administration began. So far as the Clinton administration was concerned, dealings with ElBaradei were smooth, according to Gary Samore, who served as senior director for nonproliferation on the National Security Council. One continuing concern was Iraq's nuclearweapons program, which the IAEA inspectors believed had been fully dismantled before they were thrown out of the country in 1998. "We were pretty confident that Iraq's nuclear program had been accounted for," Samore explains. "The only issue was the IAEA wanting to declare that the file was closed, and they wanted to shift to longterm monitoring. We didn't want them to do that because it would add to pressure to lift sanctions." With inspectors unable to regain entry into Iraq, the issue of keeping the "nuclear file" open was not a very contentious one.

Given his history as an American favorite, what came later in ElBaradei's dealings with the remaining superpower was surprising and bitter. The turning point came after the attacks of September 11 and the Bush administration's decision to end the regime of Saddam Hussein. As he sought to build public support in 2002–03 for an invasion, President George W. Bush told the nation about aluminum tubes that Hussein was procuring for use in the centrifuges used for enriching uranium and about Baghdad's effort to buy uranium in Niger. Vice President Dick Cheney declared his "absolute certainty" that Saddam was reconstituting his nuclear program and working to build a bomb.

An ambassador, the 17th-century English diplomat Henry Wotton famously declared, is an honest man sent abroad to lie for the good of his country. The task of a senior international civil servant is worse: He or she must tell the truth to powerful leaders for the good of an anonymous international community, and in doing so, persuade them to reconsider their actions without so angering them that they turn vengeful.

After the tense diplomacy of late 2002, Hussein allowed teams of U.N. and IAEA inspectors to return to Iraq to search for signs of chemical, biological and nuclear weapons. As everyone remembers, the inspectors found nothing to change the IAEA's conclusion that Iraq had no nuclear-weapons program. On March 7, 2003, ElBaradei reported in sober terms to the U.N. Security Council that on the basis of inspections at 141 suspected sites, there was "no evidence or plausible indication of the revival of a nuclear-weapon program in Iraq." In addition, IAEA researchers argued-as many within the U.S. intelligence community did secretly as well-that the aluminum tubes were for conventional battlefield rocket production. IAEA personnel also established that the documents that purported to show that Iraq was seeking to buy uranium in Niger were forgeries.

None of this endeared Mohamed ElBaradei to the Bush team. Secretary of State Colin Powell, who had staked his reputation a month earlier on charges of Iraqi subterfuge, responded to the director general's remarks by saying, "I also listened to Dr. ElBaradei's report with great interest. As we all know, in 1991 the International Atomic

ATOMIC ENERGY: clockwise from top left, Mohamed ElBaradei with U.N. Secretary-General Kofi Annan (right) and Hans Blix, former chief U.N. weapons inspector, in 2003; with Yukiya Amano, chairman of the IAEA board, last March; with Hassan Rohani, then-Secretary of Iran's Supreme Council on National Security, in 2003; with Iran's ambassador to the IAEA, Ali Asghar Soltanieh, in April 2006; with Hans Blix and British PM. Tony Blair in 2003; with then-U.S. Secretary of State Colin Powell in 2002.











Energy Agency was just days away from determining that Iraq did not have a nuclear program. We soon found out otherwise."

The remark was true but not exactly on point, since pre-Gulf War inspections were performed the traditional way-under Iraqi rules. Because of the U.N. resolution under which the 2003 inspections were conducted, inspectors had universal access and Iraqi compliance was required to fulfill the terms set by the Security Council. Nonetheless, Cheney announced on television that the IAEA had "consistently underestimated or missed what it was Saddam Hussein was doing," though he adduced no proof for his point, adding, "I don't have any reason to believe they're any more valid this time than they've been in the past." As one IAEA insider recalls, ElBaradei, going every bit of the way to persuade the decision-makers in Washington to rethink matters, met in 2003 with Bush, Cheney and Defense Secretary Donald Rumsfeld. This individual describes that meeting as an empty ritual. "You could tell that they were wondering why they were wasting their time with him," he says. ElBaradei later termed the outbreak of war in Iraq on March 20, 2003, "the saddest day of my life."

hat is striking about ElBaradei's performance during this episode is the extraordinary composure he showed throughout. It was the ultimate nightmare scenario for the leader of an international agency: to be pitted against his main funder, the most powerful country on the planet and the one whose support is most vital to his group's work. Although people around him confess those were dark days, "during the period of pressure, he never wavered, just did his business," says one diplomat who watched him closely. T.P. Sreenivasan, then India's ambassador to the IAEA and Austria, said that ElBaradei fully recognized what he was up against. "He was agonizing over it, because he didn't want a war," says Sreenivasan. "He didn't want to provoke the Americans, but at the same time he was very precise and very clear."

As with many individuals with powerful convictions, it is not easy to say where they draw their strength. "What makes him tick?" repeats his son, Mostafa, in response to a question. "It's almost as much a mystery to me.... A lot of it comes from his father and his upbringing. My grandfather was a very moral man. From what I've been told, speaking out in the time of oppression in Egypt for democracy and freedom, I expect some of [my father's] strength comes from that and from our family. He has his set of beliefs and his value system, and he is not swayed either way." ElBaradei's old friend Antoine van Dongen agrees: "He has an inner strength that he hardly needs to flaunt because people know it is there." ElBaradei himself feels that the ordeal emboldened him. He says, "If you are a sole individual, and you're up against the sole superpower, and you can come out on the winning side... it gave me a lot of credibility afterward. I was one of the few—and I don't like to say it—who got it right on Iraq. It shows that you really have to stick to the facts."

That extra toughness was valuable, too, because being right about Iraq was not the solution to ElBaradei's problems with the Bush administration. With ElBaradei's second term coming to an end in early 2005, U.S. officials began seeking a way to prevent him from winning a third. John R. Bolton, the hard-charging conservative who served as Under Secretary of State for Arms Control and International Security and was later given a recess appointment as U.S. ambassador to the U.N., made denying ElBaradei a third term a personal mission. According to Lawrence Wilkerson, who served as chief of staff to Secretary of State Colin Powell, Bolton was "going out of his way to bad-mouth him, to make sure that everybody knew that the maximum power of the United States would be brought to bear against them if he were brought back in."

Since the campaign to remove ElBaradei was conducted behind the curtains of diplomacy, it is not clear how much the effort was motivated by anger at the role he had played in the run-up to the Iraq war and how much by the belief that he was "soft on Iran," as one U.S. official put it. The attempt has also been widely depicted as a solo one, but diplomats from other Western countries concede that there was broader interest in finding a new leader for the agency-and some believe a coalition might have been assembled to block ElBaradei's reelection. According to one non-American Western diplomat who declined to be identified, there have been fairly widespread qualms about ElBaradei's leadership: "Our frustrations with him have centered on the fact that he has never had much sympathy for halting work on enrichment and reprocessing in Iran, despite all the information the inspectors have brought to light."

It was, nonetheless, the U.S. treatment of ElBaradei that filled the headlines. According to press reports, IAEA officials complained of a cut in the flow of intelligence from the U.S., which is essential for the IAEA's work. In December 2004, the *Washington Post* reported that U.S. intelligence agents had been tapping ElBaradei's calls, possibly in the hope of finding indications that he was trying to help Iran avoid a confrontation over its nuclear program. The leak about the surveillance may well have come from one of any number of career U.S. government officials who were appalled that the U.S. would seek to oust ElBaradei.

Whether the eavesdropping produced anything useful or not, once the story became public, the coalition-building collapsed. For a time, Powell claimed that Washington was motivated by its belief in the "Geneva Rule," a general agreement by major donors to international organizations that two terms for leaders of those institutions was enough. But even Powell admitted that the rule was not uniformly observed; in fact, at the IAEA Hans Blix served four terms, and his predecessor, Sigvard Eklund, served five.

So the argument made no headway, nor did the U.S. effort to persuade a leading Australian diplomat to take the job, or to find a suitable South Korean or Brazilian. (Questions have been raised about both countries' intentions regarding their nuclear programs, making their candidates untenable.) No other country ever publicly owned up to sharing America's concerns, and ElBaradei was reelected to his third term in June 2005. Fortified by his vindication on the issue of Iraq's nuclear efforts, the director general was unfazed. "I was in a win-win situation," he says. "If I get reelected, that is an affirmation of the international community. And if not, I will have the silent majority of the world understanding that this was the result of a conflict with a superpower...and I would be going out a hero in the eyes of the people." As his son, Mostafa, puts it, in the last few years, Mohamed ElBaradei "has had crises on his hands, but he has grown more confident as he has gone along."

Professional survival is one thing: global acclaim is another. The latter came ElBaradei's way four months after his reelection, when he was sitting at home one morning watching CNN with his wife and heard his name pronounced by someone speaking Norwegian. (The shock was so great, says Aida ElBaradei, "I can understand that people can have heart attacks from joy.") The chairman of the Norwegian Nobel Committee, Ole Danbolt Mjøs, had tried to call ElBaradei at his office but to no avail. so the announcement was made without informing the winner. There had been plenty of buzz about ElBaradei and the IAEA being in contention again for the prize (they had reportedly come close the year before). But not having heard anything, he had assumed it had gone to someone else.

ElBaradei may have been shocked, but the Nobel Committee's decision to give the prize jointly to the IAEA and its leader was not exactly surprising. It has been awarded eight times to officials of agencies within the U.N. system and at least half a dozen times to proponents of nuclear disarmament. As individuals and institutions, these two groups have been particularly attractive to a committee charged with carrying out the wishes of Alfred Nobel, the 19th-century inventor of dynamite, who said he wanted his legacy awarded to those who had achieved great strides toward the "abolition or reduction of standing armies."

What seems to have particularly attracted the Norwegians was how honoring the IAEA and its leader would lend support to the international system, and in their announcement they said explicitly that at a time of a growing nuclear threat, the "Nobel Committee wishes to underline that this threat must be met through the broadest possible international cooperation. This principle finds its clearest expression today in the work of the IAEA and its director general." ElBaradei was singled out as "an unafraid advocate" of the nonproliferation regime.

Though Mjøs denied that the award was "a kick in the shin of any nation, any leader," the language suggested that ElBaradei's recent run-ins with the U.S. government were very much on the minds of the committee members. The award followed the 2002 prize to former President Jimmy Carter, who had been outspoken in his opposition to the war in Iraq, and the 2005 prize in literature to British playwright Harold Pinter, a vitriolic critic of American foreign policy.

Ever the diplomat, ElBaradei insisted that the world's preeminent award not be seen as a reproach. "I don't see it as a critique of the U.S.," he said at the time. "We had disagreement before the Iraq war, honest disagreement. We could have been wrong, they could have been right." Instead, he said, the prize should be seen as "a message: Hey, guys, you need to get your act together, you need to work together in multinational institutions." In the time between the campaign to unseat ElBaradei and the announcement of the Nobel, the dramatis personae had changed in Washington. From the State Department, both Secretary of State Condoleezza Rice and Under Secretary for Political Affairs R. Nicholas Burns congratulated the director general.

Not everyone was so laudatory, however, and the reactions to the prize say something about the impossibility of satisfying everyone while running an agency that deals with things nuclear. Mike Townsley, a spokesman for the environmentalist group Greenpeace International, which strongly opposes nuclear power, commented that ElBaradei was trapped by the agency's "contradictory role, as nuclear policeman and nuclear salesman."

John Ritch disagrees. "The IAEA will always be subject to ideological criticism for even existing. But it could hardly be more unlike a salesman. Indeed, a valid criticism would be that the agency has not fully embraced the urgent necessity of promoting the peaceful uses of nuclear energy. The IAEA should be leading the way."

Uring the Nobel festivities in Oslo, ElBaradei enjoyed his share of adulation. "Endured" might be a better way to put it, though, as he was thrust into a spotlight that all but overwhelmed him. One of the events involved a concert in his honor, and he came onstage to deliver a short off-the-cuff speech. The audience gave him a prolonged round of applause before he started, and when ElBaradei finished speaking, he received another resounding ovation from the 4,000-member audience. After a few seconds of clapping, he turned to walk off—only to be pulled back on stage by actresses Julianne Moore and Salma Havek.

The prize ceremony also afforded the winner the platform of a lifetime, and for that ElBaradei overcame his shyness. Although even close friends consider him an uneven

SCHOOL TIES: Jay Furman '71, Provost David McLaughlin and NYU President John Sexton present Mohamed ElBaradei with an honorary LL.D. in 2004.



speaker, he delivered a remarkable piece of oratory, spelling out his understanding of the myriad interconnections among some of the ills that plague the world, from ground-level poverty to weapons of mass destruction. The connections, he continued, can easily be traced to the most fundamental inequities: "In the real world, this imbalance in living conditions inevitably leads to inequality of opportunity and, in many cases, loss of hope. And what is worse, all too often the plight of the poor is compounded by and results in human-rights abuses, a lack of good governance and a deep sense of injustice. This responsibility, would think of advocating seriously. But ElBaradei has made it to the pinnacle of international service and does not tire of making that point—to the irritation of officials who believe that the interconnectedness of all things and the failures of the world order are not the IAEA director general's business. "In the Nobel speech, he went well beyond his mandate," grouses one senior American official. In the view of this diplomat—and more than a few others—ElBaradei's job is to run an international organization with a technical mandate, one that requires that he present

"We pay less than 10 percent of what we spend on armaments on development. It comes back to haunt us in the form of extremist groups, in the form of disaffected people. We look at the symptoms; we do not look at the big picture."

combination naturally creates a most fertile breeding ground for civil wars, organized crime and extremism in its different forms."

"It's not just poverty per se, it's the sense of humiliation and injustice. When somebody feels humiliated, they just go bananas, and that is what happens," ElBaradei observes while talking about the sociology of conflict in his Vienna office. Like many analysts of radical Islamist violence, ElBaradei believes that the rise of the new terrorism-and September 11 itself-has roots in a sense of civilizational humiliation. The commitment to alleviate suffering is one that he takes personally, too. The \$1.3 million in Nobel prize money was divided equally between the IAEA and its director general. The agency donated its share of the award to a new fund for cancer treatment and childhood nutrition. ElBaradei gave his half of the prize to a group of Cairo orphanages with which his sister-in-law works.

The notion that we have our most fundamental priorities all wrong falls into the category of all-but-universally-accepted and is therefore something that few grown-ups, especially those in places of international factual accounts of what different countries are doing with their nuclear facilities. Taking on the structure of global politics is something for national leaders and the secretary-general of the U.N.

The critics may have a point, but, Nobel in hand, ElBaradei is not shying away from the issue. The international community's misallocation of resources between the tools of conflict resolution and those of war is a subject that he turns to in conversation repeatedly and in a tone that suggests he has neither illusions about the likelihood of broad change nor regret for voicing his dismay. "I think the whole budget of the entire U.N. system plus the other [multilateral] organizations is not more than, like, \$5 billion. And against that you are talking \$1 trillion on armaments When you look at the figures, it just shocks you," he observes. Turning to another side of the equation, he says, "We also pay less than 10 percent of what we spend on armaments on development. Well, that comes back to haunt us in the form of extremist groups, in the form of disaffected people.... We look at the symptoms; we do not look at the big picture."

The IAEA's annual budget is \$347 million (€273 million), and most of that goes to the agency's inspections work. But to the extent he has been able, ElBaradei has pushed projects that address concerns at what might be called the bottom end of his great chain of human unhappiness. Using a variety of nuclear-related technologies, IAEA scientists are working on improving agricultural yields in developing nations, allowing for more efficient water use and working to bring advanced cancer therapy to nations that have little or none available.

profound desire to avoid military conflict and a high-wire talent for redefining the boundaries of his job have been the hallmarks of ElBaradei's tenure at the IAEA. Both of these qualities have been severely taxed by the continuing tensions over Iran, and how that plays out will likely provide the final verdict on his time in office. For a while, it looked as though there was reason for optimism that a full-blown crisis would be escaped. In October 2003 Iran forged an agreement to suspend its enrichment activities while negotiations were underway with the EU-3. But in August 2005, the country reneged and resumed efforts at a facility in Isfahan. Positions hardened after the election of extremist Mahmoud Ahmadinejad, who declared Iran's absolute determination to continue doing what it was doing.

The failure of the negotiations soon put ElBaradei and the U.S. at loggerheads again. Under the IAEA charter, if the director general reports to his board of governors that a signatory is not living up to its treaty agreements and is found in violation by the IAEA board, that country is to be reported to the U.N. Security Council for further action. But in the eyes of the U.S. and its allies, ElBaradei was ducking his responsibility and working beyond his portfolio to keep the problem at the IAEA and prevent an escalation of tensions. As one Western diplomat, who acknowledges that he finds ElBaradei both an admirable and infuriating figure, puts it, "Once the suspension was no longer honored by Iran, we had another problem with him. He was trying to influence members not to take a direction that was provided for by IAEA statutes."

ElBaradei did so, critics contend, by avoiding inevitable conclusions in his reports and through behind-the-scenes entreaties to officials from the various countries on the board to go slow on Iran. Repeatedly, the reports have documented an array of failures by Iran to comply with its treaty obligations, but ElBaradei has avoided declaring that Iran has a nuclearweapons program, angering Washington and other Western capitals. "Some day, we'll see the 'director's cuts' of the reports," says one American diplomat, whose opinion is shared by many, including some who are ardent critics of the Bush administration. "There is no question that they go through an editing process.... He's not prepared to confront the Iranians as strongly as we are."

It is the responsibility of the IAEA director general to oversee the production of reports for the organization's board and the U.N., but in this case, his critics say, ElBaradei has used his stature to steer the process away from a confrontation with Iran-and that this is another instance of his mixing in the politics of the issue rather than confining himself to the technical issues with whose adjudication he is charged. Even ElBaradei's former deputy, Pierre Goldschmidt, who oversaw many of the inspections, took a notably tougher stance after his 2005 retirement and urged the Security Council to get involved. "ElBaradei says that any judgment about Iran should be made on their intentions," he told the Sunday Telegraph. "My view is that we should look at the indications, not the intentions, and then decide As things stand, we cannot prove that Iran has a military nuclear programme. But do you have indications that this is the case? This is the question I think everyone should now be asking."

The same diplomat who criticized ElBaradei for seeking to persuade board members not to refer the issue of Iran to the U.N. believes that the director general

is "a political animal and a diplomat, and he knows diplomacy is more fun than managing a large institution." A further part of this critique is that ElBaradei has prevented the U.S. and its allies from putting all the necessary pressure to bear on Iran, and that his desire to prevent armed conflict is at odds with his technical duties. But ElBaradei rejects the contention that he is out of line. "I've heard that a lot in the past. I don't hear it as much now. People said I was talking outside of the box and this is a technical organization. I think that is a fallacy," he says. "Yes, this is a technical organization, but we work in a very politically charged environment, and you cannot separate the politics from the technical work we do." Much of his job, he says, is to identify the various options available to the parties: "I don't meddle in the politics, but I have to be aware of the political implications of what we do. And I feel I owe it to the member states to tell them how I see things from where I sit." He adds, "I look at the big picture. I have to do verification, but I also have to see how the international community can use this for a peaceful resolution."

Underlying his actions, his aides say, is a sense that moving the issue to the Security Council would be a fateful mistake that could lead ultimately to military action. Throughout the latest crisis, the U.S. has made clear that its objective is to obtain a resolution under Chapter VII of the U.N. Charter, which would make the issue one of a threat to peace. In principle, that could open the door for the U.S. and others taking it upon themselves to enforce the resolution in Iran militarily, as Washington argued it did in invading Iraq. The White House continues to call for a diplomatic solution. and no one close to the issue believes that military action would occur before a sustained effort to isolate and penalize Iran economically through sanctions. Ultimately, ElBaradei would lose the fight against referring Iran to the Security Council, but Russia and China have been reluctant to authorize sanctions, thus postponing a possible conflict. Still, those close to ElBaradei argue that he does not want to go that route, at least as long as IAEA inspectors can work in Iran. As his speechwriter, Coblentz, explains, ElBaradei "believes that confrontation is so counterproductive and that it will take so long to pick up the pieces that ... diplomacy has to be the answer."

For ElBaradei, it comes down to a matter of moral responsibility: "You can act as a bureaucrat in the negative sense and do your job and go home. Or you can realize that there is something you can do to make people safer and better off. And you do what you have to do."

Daniel Benjamin, coauthor of The Next Attack: The Failure of the War on Terror and a Strategy for Getting it Right, is a senior fellow in the International Security Program at the Center for Strategic and International Studies. He served on the National Security Council during the Clinton administration.

BEARING THE TORCH: Mohamed ElBaradei lights the Nobel flame with Yukiya Amano, the chairman of the IAEA Board of Governors; with the 2005 peace prize.



CRANDMASTERS, ALL:

The NYU School of Law civil procedure faculty. For a key to who's who, please see page 35.

THE RULES OF THE CAME

BY ROBIN POCREBIN AND EDWARD KLARIS ILLUSTRATIONS BY STAN FELLOWS PHOTOCRAPHY BY JULIANA THOMAS SUZANNE BARLYN AND LARRY REIBSTEIN CONTRIBUTED TO THIS STORY. very first-year law student is required to take Civil Procedure, a daunting course with a massive, I,200-plus page textbook on the Federal Rules of Civil Procedure. The temptation to treat this foundation course like bitter medicine just learn the rules, please—is strong. But at the NYU School of Law, the faculty is passionate about civ pro as teachers, as scholars and as lawyers. They call it "the lawyer's toolbox" or "the keys to the kingdom," and they even compare it to a certain cerebral board game....

When Michael Gordon '91 thinks back to his first year as a student at the New York University School of Law, one memory that still makes him smile is of his Civil Procedure class with Professor Samuel Estreicher. The professor would pick one student for questioning and would stick with him for what sometimes seemed the entire two-hour class. "Mr. So-and-So, today is your day in the sun," Gordon recalls Estreicher's words. The prospect of being called on motivated Gordon to study hard. Estreicher's "scholarship was so impressive you wanted to be able to communicate on the same level," says Gordon. "His rigorous standards challenged you to be a better legal thinker." As it happened, though, Gordon, now a partner at Katten Muchin Rosenman in New York, was never called on, so if the class was a nail-biter, at least he became quite proficient. He says, "One of the reasons why civ pro has stuck with me was that I treated it as my top priority."

But Gordon also laughs at some of the cases discussed that at the time seemed so complex. If someone is served a summons on an airplane, for instance, what is the

jurisdiction for purposes of being sued? How quaint that seems today. Now, the Internet, technology and globalization have made a mishmash of the idea of jurisdiction. "You can solicit via a BlackBerry," Gordon says. "You can solicit via the Internet. Somebody can click on a Web site that you've created and thus, you can expect that someone in Ohio will see it and want to do business with you." Where do you go in a dispute? And then of course there are discovery issues, such as email, and electronic intellectual property disputes that weren't contemplated when Gordon was a student. What to do about a Greenwich, Connecticut, hedge fund whose failed assets are overseas, or a U.S.-based corporation that is accused of despoiling the environment abroad, or a U.S. citizen accused of being an enemy combatant and held at an American military base in a foreign country? No wonder some might yearn for the days of the airline case.

And yet, as the Law School faculty preaches, the basic civil procedure doctrines are the same. *Pennoyer v. Neff*, which set physical presence as the guiding factor in jurisdiction, still matters as a starting point. Whether a plaintiff has a right to a jury trial matters. How plaintiffs can aggregate their claims through a class action matters. The key to civil procedure, suggests Professor Samuel Issacharoff, is to think of it as a chess game with an expanding universe of choices—any of which can make or break your case. "A good player always considers the implications many moves down the road," he says. "And a weak player sees only the immediate issue. In this way, what students are being trained for is very similar to how you train chess players."

That description largely captures the mission of the civil procedure core faculty at the Law School, a group of professors regarded as the strongest in the nation. While teaching the doctrine to first-year law students, professors-from Oscar Chase to Helen Hershkoff, from Samuel Issacharoff to Burt Neuborne, and from Geoffrey Miller to Linda Silberman-are preparing their students to use this basic subject in a rapidly changing world. In addition to teaching, the professors have also participated in some of the most significant cases or projects in civil procedure recently, including Neuborne, who won an historic settlement in the cases of Holocaust survivors suing Swiss banks; Silberman, as part of a U.S. State Department delegation involved in the negotiation of an international treaty on jurisdiction and judgments for transnational custody disputes; and Miller, who is teasing out statistics that measure the efficiency of class action suits and arbitration.

Furthermore, several professors, including Rochelle Dreyfuss, Samuel Estreicher, Barry Friedman, Andreas Lowenfeld and Nancy Morawetz, teach clinics, seminars and upper-level courses that deepen the students' understanding of the subject and push the boundaries of civil procedure. To cite a few examples: Dreyfuss is working on jurisdictional issues in intellectual property law; Estreicher is one of the leading supporters of arbitration in employment



"Procedure is the most wonderful law school course to teach.... The subject matter—which [students] suspect is going to bore them—actually deals with some of the most fundamental issues they will face as they begin to think about law as an institution." JOHN SEXTON, President, New York University



CEOFFREY MILLER, Stuyvesant P. Comfort Professor of Law; SAMUEL ISSACHAROFF, Bonnie and Richard Reiss Professor of Constitutional Law

disputes; and Morawetz is breaking new ground in applying the rules of habeas corpus to immigration rights cases.

"The NYU civil procedure faculty is a magnificent group," says Arthur R. Miller, a legendary Harvard Law School civil procedure professor himself who has firsthand knowledge of the faculty as a long-time visiting professor at the NYU School of Law. "Collectively, they probably have about 150 years of classroom experience in the field and subspecialties in complex, transnational, constitutional, civil rights and commercial litigation as well as empirical work on the subject," he says. "In my opinion, it's the best group in the law teaching business."

Harvard Law School Professor of Law Emeritus David Shapiro, an "icon in federal courts jurisprudence" who has also visited the NYU School of Law several times, drills down even further: "Burt teaches from the perspective of an experienced litigator. Sam Estreicher is primarily involved in labor and employment law. Rochelle Dreyfuss is involved in technology. Silberman's perspective is within an increasingly international sphere and Sam Issacharoff's is primarily class actions and aggregate litigation." Says Neuborne, "There isn't any place—*any place*—that comes close to NYU."

SETTINC UP THE BOARD

John Sexton, dean of the Law School from 1988 to 2002 and now the president of NYU, likes to tell the story of how he got hooked on civil procedure. When he was a 1L at Harvard in the '70s, he took a civil procedure class with Arthur Miller. Miller (no relation to NYU colleague Geoffrey Miller) put Sexton on the spot for the entire class—just like Estreicher has done with his students—including some heated exchanges. Miller later said he "never enjoyed a class this much." Sexton felt the same way, and later taught Civil Procedure for 20 years beginning in 1981.

"To me, Procedure is the most wonderful law school course to teach," Sexton says. "First, you're getting the students when they are just beginning to think seriously about law. Second, the subject matter of the course itself—which they suspect as they enter is going to bore them—actually deals with some of the most fundamental issues that they will face as they begin to think about law as an institution."

Sexton isn't the only one to have come under Arthur Miller's spell. Miller, who first taught Civil Procedure at the University of Michigan Law School and then for the past 25 years at Harvard, is known by every lawyer in the country for coauthoring the leading multivolume treatise on civil procedure, *Federal Practice and Procedure*, which was first published in 1969 and to which he continues to contribute. Every law student knows him for coauthoring one of the leading civil procedure casebooks, and for his study guides for civil procedure exams and the bar exam. He is familiar to a general audience, too, for moderating the Fred Friendly roundtables on PBS for many years.

Indeed, Miller can count more than one member of NYU's first-class civil procedure faculty among his former students. Linda Silberman, the Martin Lipton Professor of Law, is a former student of Miller's from Michigan. She started teaching at the NYU School of Law in 1971.

Silberman now stands as one of the most senior members of the civil procedure faculty. Of the current crop, only Andreas Lowenfeld, who arrived in 1967, has been teaching civil procedure longer. Silberman was followed by Neuborne, who started as a full-time professor in 1974, and then by Estreicher in 1978, Chase in 1980 and Dreyfuss in 1983. Jump ahead to 1995 and the arrival of Geoffrey Miller, wooed from the University of Chicago Law School, and Hershkoff, who was in the legal trenches for almost 20 years. Just last year came the latest big catch: Samuel Issacharoff, recruited from Columbia Law School.

As it happens, this is a pretty collegial bunch. Starting in the spring of 2005, the professors began meeting on Tuesdays for lunch in the faculty library. The impetus was to take advantage of the presence of Arthur Miller and David Shapiro, both visiting that term from Harvard. There was no schedule, no pressure from the dean to meet-just an impromptu, bring-a-sandwich lunch gathering that has turned into a semiregular Tuesday event. "It's an occasion when law nerds can talk to each other without risking public humiliation," Issacharoff says drily. Indeed, the topics have included the "broader implications of Rooker-Feldman doctrine-a subject so obscure that it is not clear that it exists," says Issacharoff, joking. (As a refresher, that's the doctrine that concerns when federal courts may revisit the judgments of state courts.) Other topics include class actions and the scope of federal authority in doctrines such as federal preemption. "At some level of abstraction they're all interesting," he says, laughing. "At the level of detail they're discussed, they would drive anyone to drink."

OPENING MOVES

Like many law schools, NYU's has evolved in the past four decades from professional, practically oriented teaching to a more academic, theoretical program-"much more like a graduate school model," says Silberman. Faculty usually take one or the other view of what a law school should be. But ask the civil procedure faculty today about the practical versus theoretical issue, and the answer is fairly uniform. "If you don't successfully learn the theory, you can't provide the rule in a practical way," says Oscar Chase. Helen Hershkoff sees in civil procedure "a convergence of theory and practice." Indeed, Silberman's casebook, coedited with two of her former students who are now procedure professors themselves-Allan Stein '78 at Rutgers University and Tobias Wolff of the University of California, Davis-is entitled Civil Procedure: Theory and Practice.

While each teacher approaches the subject differently, their courses generally cover several areas. By the end of the semester, the professors want their students to grasp the basics of civil procedure, such as subject matter jurisdiction (the basis for the court to hear the case), personal jurisdiction (whether a court can require a person to appear before it) and the Erie Doctrine, which says that one must apply state law when a federal court has diversity jurisdiction (with parties from different states).

Professors cover other procedural aspects of civil litigation, depending on their particular interests. Some professors spend time with the Federal Rules of Civil Procedure, examining, say, summary judgment and dismissal, and joinder (which allows a party to combine multiple claims in one lawsuit) or class actions. Other professors spend time on questions of finality, which refers to the binding effect of judgments. Many cover all of these topics.

But beyond picking and choosing which procedural devices they want to include, professors also use the five hours a week that students are in their classes to impart different philosophical approaches to the law.

Samuel Issacharoff and Geoffrey Miller, for example, are proponents of law and economics—an influential perspective in the academy. Issacharoff, the Bonnie and Richard Reiss Professor of Constitutional Law, is regularly retained as a consultant or an expert in mass aggregate litigations and class actions, such as for the diet drug fen-phen (which caused dangerous side effects affecting the heart) and tobacco, and



is deeply involved in the dispute over political gerrymandering. Miller, the Stuyvesant P. Comfort Professor of Law, also directs NYU's Center for the Study of Central Banks. In integrating economics into civil procedure, they emphasize that the system cannot treat every litigant equally; that time, money and manpower must be allocated judiciously; and that different cases merit different levels of attention.

"There's a finite amount that you want to invest in any potential piece of litigation, and that means that you have to judge how much fairness we need, given the resources we are putting in," says Issacharoff. "So if somebody is sitting on death row, we as a society throw a lot of resources at that. We allow habeas challenges, we allow a second round of appeals, we allow for a broad series of legal protections. Whereas, if somebody has a simple contract dispute with somebody else, the parties have an important interest in getting it done and getting it done cheaply, and getting it done commensurate to what's at stake."

He teaches a case involving the city of Chicago's policy of giving parking ticket violators limited trials and no appeals. A suit was filed claiming infringement of due process rights. But an opinion by Judge Richard Posner soundly rejected that notion. Recounts Issacharoff: "He says, 'No. You get only as much process as what is justified by what's at stake here. These are \$50 tickets.' We can't put a policeman as a witness on the stand every time there is a parking ticket dispute," Issacharoff adds, invoking Posner's reasoning.

Geoffrey Miller has adopted a sophisticated empirical approach to civil procedure, undertaking extensive studies of attorney fees in class actions and state court decisions, for example. He is one of the leading proponents of empirical analysis of legal issues, which has recently seen a dramatic growth in popularity, despite being around since the 1970s and '80s. The legal community is embracing the empirical approach, he says, because "if it's done right it doesn't attempt to argue for or against any moral or social objective, but to figure out how the law functions in practice-what its consequences really are. [Empiricism accomplishes this] without being speculative but by actually counting and observing."

Two years ago, he coauthored a study that concluded that the average price of settling class action lawsuits and the average fee paid to lawyers who bring them had held steady for a decade, even though companies say the suits are increasing business costs, hurting the economy and enriching lawyers. The controversial issue was central to the heated debate over whether to place limits on class action lawsuits, as urged by Republican legislators and President George W. Bush.

The study reveals that, from 1993 through 2002, "contrary to popular belief, we find no robust evidence that either recoveries for plaintiffs or fees for their attorneys as a percentage of the class recovery increased." The average settlement over the 10-year period was \$100 million in inflation-adjusted 2002 dollars, according to the study. Average settlements were as low as \$25 million in 1996 and as high as \$274 million in 2000—a result of four settlements that year for more than \$1 billion each. "The mean client recovery has not noticeably increased over the last decade," Miller wrote with Theodore Eisenberg, a law professor at Cornell.

Another area he's studying is alternative dispute resolution. Popular literature touts the supposed advantages of arbitration and mediation (faster, more flexible), so one would assume every party would always opt to resolve their disputes that way. Yet in analyzing 2,000 major commercial contracts, Miller and Eisenberg found that companies

LINDA SILBERMAN, Martin Lipton Professor of Law; OSCAR CHASE, Russell D. Niles Professor of Law;

ANDREAS LOWENFELD. Herbert and Rose Rubin Professor of International Law; ROCHELLE DREYFUSS. Pauline Newman Professor of Law

rarely opt out of litigation, even though they have the ability to do so. "It doesn't say arbitration is bad, but there are questions that can usefully be looked at—why don't they choose arbitration when they have reason to do so?" asks Miller. He cautions that his empirical approach doesn't answer the normative questions. "But," he says, "if you do normative analysis without data, you're basically whistling in the dark."



Burt Neuborne and Helen Hershkoff are veterans of civil rights litigation, and often introduce that perspective to teach their civ pro courses. "You can't do effective law reform work unless you are a master at procedure," says Neuborne, the Inez Milholland Professor of Civil Liberties and a self-described procedural wonk. "The odds of winning a law reform case are so small, and the odds of actually moving the society through litigation are so long, that it's almost criminal to add to the odds by falling through a procedural trap. You have to close the procedural trapdoors, or else civil rights litigation becomes an inefficient use of social resources." Little wonder, then, that his former American Civil Liberties Union colleagues liked to call him "the plumber," the go-to guy who specialized in procedural issues like jurisdictional standing and mootness-things that could hold up a case.

Neuborne has been involved in such hot-button cases as flag burning, the Pentagon Papers and the constitutionality of the Vietnam War, and continues to litigate cases himself and through the Law School's Brennan Center for Justice, which he helped found and for which he serves as legal director. "The practice is important to my teaching," he says. "I wouldn't be the teacher I am if it wasn't for the practice."

In teaching class actions during firstyear Procedure, Neuborne has recently used the case he filed to obtain reparations on behalf of Holocaust victims. In July 2000, a federal judge gave final approval to a \$1.25 billion accord to settle claims of Holocaust survivors who had sued a group of Swiss banks they said had hoarded and concealed assets deposited in World War II and accepted profits of slave labor illegally obtained by the Nazis. One of the critical issues was jurisdiction. "How is it that a lawsuit can be brought in the U.S. about activities that took place 60 years ago, far far away in a different galaxy?" he says he asks his students. "How is it that a court in Brooklyn is handling these cases—other than divine justice? How is it that a federal court has jurisdiction over the Swiss banks?"

The answer is a whole lesson in what Neuborne calls "probably the most important jurisdictional issue" now. In short, if the Swiss banks want to be world-class banks, they must maintain a major presence in the United States, which creates in personam jurisdiction. "The moment Credit Suisse acquired First Boston," says Neuborne the lawyer, "I had them." But as a professor, Neuborne probes this question further with his students. "The question is, should I have them? And that then allows me to teach what is an ordinarily arcane subject that puts students to sleep."

Andrew Celli Jr. '90, former chief of the Civil Rights Bureau in the Office of the New York State Attorney General Eliot Spitzer and now a partner at Emery Celli Brinckerhoff & Abady, a New York law firm, will attest to the stimulating effect of Neuborne's personal anecdotes and "enormously creative procedural mind." "Burt's stories about cases such as stopping the bombing in Cambodia violated all expectations [about Civil Procedure as a course] because it wasn't about memorization," says Celli. "It was about understanding the power relationships behind the rules."

Hershkoff, like Neuborne, became a professor after working at the ACLU, where she was an associate legal director for eight years. The year she left practice to join NYU, *New York* magazine included her on its annual list of the most important civil rights lawyers in the city. Her lawsuits tended to be large institutional reform cases involving the rights of groups as diverse as the mentally retarded, public school students, homeless families and union dissidents.

Hershkoff, the Joel S. and Anne B. Ehrenkranz Professor of Law, now serves as a codirector of the Arthur Garfield Hays Civil Liberties Program at the Law School, with colleagues Norman Dorsen and Sylvia Law, and has joined Arthur Miller, John Sexton, and Jack H. Friedenthal of George Washington University as a coauthor on their civil procedure casebook. Her scholarship focuses on the role of law and courts in supporting social change, and she has published extensively on state courts and the enforcement of state constitutional rights. She also works with organizations like the Ford Foundation and the World Bank on projects using law and litigation to reduce inequality. Not surprisingly, Hershkoff's

teaching emphasizes the importance of civil procedure to democratic values. "Process forms an essential part of the rule of law," she explains. Benjamin Wizner 'oo, now a staff attorney in the ACLU's national office in New York, recalls that Hershkoff always came back to a central theme: Is it fair? What's the standard to determine what is fair? And what are the countervailing social values? This set of questions has dominated Wizner's work, which has involved visiting Cuba to observe military proceedings at Guantánamo Bay, Cuba. Procedure dominates other aspects of Wizner's civil liberties practice as well. For example, Wizner confronted a jurisdictional issue in a case against the government involving the rendition of a German citizen, Khaled El-Masri. The ACLU wanted to sue the then-director of the Central Intelligence Agency, George Tenet, and three private aviation companies on El-Masri's behalf, but where? "The companies are all over the country. George Tenet lives in Maryland. The CIA is in Virginia," Wizner recalls. He ended up suing in Virginia's Eastern District because the CIA made what the ACLU alleged was an illegal agreement with the aviation companies, which did business in the CIA's venue. Unfortunately for Wizner's client, the court dismissed the case last May over concerns that public proceedings would jeopardize state secrets.

KINC OF TORTS: MASS HARM CASES

Just as the nation is divided over the efficacy of class suits to address mass harms (such as a bad drug or a defective consumer product or even stock adversely affected by corporate wrongdoing), so are NYU's law professors. "The biggest puzzle in American procedure today is how do we deal with mass torts or other mass victims," Oscar Chase says, "and we haven't really worked out a satisfactory solution."

Arthur Miller finds himself on opposite sides from his protégée Linda Silberman on the subject of class actions. "Curiously, Linda and I—as much as we love each other and have known each other for 30, close to 40 years—have diametrically opposed views about class actions," he says. "I am a great fan of them; she finds them to be the work of the devil."

Silberman argues that if the court is going to aggregate plaintiffs' actions from all over the country, the court must take into account the state law that should apply for each plaintiff. She contends that the convenient aggregation of all mass claims is not what is intended by class action rules. "The class action was designed for cases in which aggregation would not be too complicated. And if, in fact, it is too complicated, it's probably not the right device," she says. Besides, Silberman adds, if change is desired, Congress could adopt statutes to address the procedures for dealing with specific mass torts, such as a national consumer law to address products liability.

Silberman has been retained in recent class action litigations as an expert on this issue. In one case, plaintiffs claimed economic losses for property damage caused by defects in personal computers. Silberman addressed questions about which remedies the plaintiffs had in different states. Courts held that in almost all the cases, the law of the plaintiff's home state had to apply, which rendered the class unmanageable.

Miller and Silberman do have some common ground, however. "We both agree completely that the globalization of a class action, in something like pedophilia and the priest abuse cases, is an absolutely perfect utilization of the class action because it gives voice to a group of people who have no voice," Miller says. "It provided a vehicle to enable them to come forward without ever being disclosed."

Issacharoff says that, regardless of the diverging viewpoints on class actions, they're here to stay-and rightly so. He is currently the chief reporter for the American Law Institute (ALI) project Principles on the Law of Aggregate Litigation, for which he is examining ways to handle common issues in mass torts and other cases such as contract or common law claims. Harms that occur on a mass scale, similarly affecting so many people, require novel court procedures to resolve the claims efficiently but fairly. The project will examine the viability of complex alternatives, such as forcing claims into one mass proceeding; allowing for extraordinary procedures, such as interlocutory appeals; and even denying to some litigants the right to proceed on their own. "This is an area fraught with difficulties, not the least of which is the due process concern for the rights of individuals," Issacharoff says. But he acknowledges that certain types of class actions are more problematic than others—for example, cases that address individual injuries that are not standardized, such as physical maladies related to asbestos or fen-phen. The procedure is better designed for cases involving mass economic harms, such as consumer fraud, securities and antitrust issues, he says. (For more insight into the debate over how best to litigate mass harm cases, please see "Heads of the Class" on page 36.)

THE CLOBAL CAMBIT

Global jurisdictional issues have moved to the forefront of controversy as the world shrinks and business is increasingly conducted internationally. Yet the court system we have come to take for granted appears quite alien to people in other countries. Essential elements like the civil jury, pretrial discovery and experts chosen by the parties rather than appointed by the court are all unique to the American system, which in some cultures is still viewed with suspicion.

"You talk to lawyers in other parts of the world and they think we're nuts because we have juries in civil cases and because we have wide-open discovery-which they fear as if it were the Antichrist-and because we have reasonably broad jurisdictional notions," says Arthur Miller. He points out, however, that here and there other nations are thinking about incorporating one or more of these elements. "China is studying the class action," Miller says. "You find other nations thinking about the class action simply out of recognition of the growing frequency of injurious mass phenomena. You find some nations thinking about instituting civil jury trial. Isn't that crazy?"

To give students more foreign perspective, the Law School added a course on Comparative Civil Procedure—taught regu-



larly, though not every year—usually with a professor visiting the NYU School of Law from Europe or Asia through the Hauser Global Law School Program. The global program was founded by then-Dean Sexton and Norman Dorsen, the Frederick I. and Grace A. Stokes Professor of Law and a member of the Council on Foreign Relations. Dorsen served as the Hauser Global Law School Program's founding faculty director.

"Norman encouraged faculty to introduce transnational and comparative themes into the first-year curriculum," Hershkoff says of Dorsen. "With his support, Oscar Chase, Rochelle Dreyfuss and I took early steps to collect resources in this field. And of course Oscar and Linda cotaught a course on Comparative Civil Procedure." Chase, Hershkoff and Silberman have since participated in workshops and conferences sponsored by the American Assocation of Law Schools on how the first-year Civil Procedure curriculum can "go global." "Students are surprised to learn that procedural systems differ from country to country," Hershkoff explains. "For example, elsewhere in the world, only a government official can serve a summons-indeed, it's a crime in some countries for a private individual to do this."

The large number of foreign students at NYU has added yet another dimension, bringing the firsthand experience of different cultures into the classroom. Andreas Lowenfeld, the Herbert and Rose Rubin Professor of International Law, is one of the giants in the field of comparative civil procedure. Lowenfeld is frequently an arbitrator in international disputes, pub-



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ARTHUR MILLER, visiting professor of law and Bruce Bromley Professor of Law, Harvard Law School

lic and private. He has argued before the U.S. Supreme Court, the Iran-U.S. Claims Tribunal and the International Court of Justice. Before coming to NYU, he served as deputy legal adviser of the U.S. Department of State. And he is the author of a pioneering casebook on international litigation and arbitration, which was revised just this year. In 2001, he and Silberman convened a conference on the proposed Hague Convention on Jurisdiction and Judgments, which brought together some of today's most knowledgeable theorists and practitioners on international jurisdictional issues. The two professors have edited a book based on the proceedings.

Lowenfeld and Silberman also coteach a seminar on international litigation and arbitration. Lowenfeld says they try to have half the students in their International Litigation course be foreign-trained to generate crosscultural understanding as they write briefs and argue together. Lowenfeld also says taking civil procedure out of the national context offers students an opportunity to further their understanding of it. "If you like procedure, you'll love international litigation," he says. "The issues are not settled-they're open, they're at the frontier. We take real cases and we have the students argue them." In fact, last year the course focused on six cases that were subsequently heard by the U.S. Supreme Court.

Silberman and Lowenfeld were coreporters for the ALI on the project *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*. The project, recently adopted by the general assembly of the ALI, proposed a federal statute that would provide uniformity throughout the United States in the recognition and enforcement of judgments issued by courts in foreign countries. States currently have different laws on the subject, creating the potential for diverse outcomes based on identical facts. Lowenfeld gives an example: Suppose an American tourist from Pennsylvania is in a car accident overseas. She is sued in that country and a judgment for damages is entered against her. Pennsylvania will not enforce the judgment according to its laws, but the tourist also has a bank account in New York, which will enforce the judgment. "It makes no sense to have different laws because enforcement of judgments is an aspect of international relations, and, therefore, is a suitable subject for legislation by Congress," says Lowenfeld.

Oscar Chase, the Russell D. Niles Professor of Law, has become something of a guru on comparative procedure. His paper, "American'Exceptionalism' and Comparative Civil Procedure" (in the *American Journal* of Comparative Law in 2002, and also translated and published in a Russian and a Brazilian law journal), argues that our civil procedure is very unusual compared to the rest of the world's—and that we've resisted borrowing. Using juries in civil cases, for example, is unique to America, he says, and "strikes the Europeans as bizarre."

Chase has also been involved in what he describes as contextualizing dispute resolution. His recent book-Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context-deals with comparative law in other modern societies as well as in small-scale tribal groups, and argues that their codes are resonant with the cultures in which they operate. African communities that use oracles to try disputes make sense if you study the culture of those communities. Similarly, civil juries make sense in America because of our commitment to populism and democracy. "The idea is that there is a relationship between how societies structure their disputing systems and their underlying culture, and that you can't really understand your own system and its relation to the society where you find it unless you go outside of it," Chase says.

One effective way of going outside the American system is by inviting foreign perspectives in. To that end, Chase, Hershkoff



and Silberman are coediting a book of readings on comparative civil procedure with three scholars who have each been members of the Hauser Global Law School Program visiting faculty: Yasuhei Taniguchi, a professor of law at Tokyo Keizai University and a member and former chairman of the World Trade Organization Appellate Body; Adrian Zuckerman, a fellow at University College, Oxford; and Vincenzo Varano, a professor and former dean at the University of Florence School of Law.



"We teach students that the kind of choices you make will affect the way the whole case is seen by the other side and by the court, and will affect your ability to ultimately achieve what you want for your client."



BURT NEUBORNE, Inez Milholland Professor of Civil Liberties; HELEN HERSHKOFF, Joel S. and Anne B. Ehrenkranz Professor of Law

KNICHT MOVES

Rochelle Dreyfuss and Samuel Estreicher had taught the first-year Civil Procedure course for dozens of years combined before redirecting their energies to building up the Law School's offerings in other fields of interest—namely, intellectual property and labor and employment law, respectively. But both professors never really left civil procedure behind and have made notable contributions to the legal scholarship.

Intellectual property has undergone more wrenching change, thanks to globalization and technology, than perhaps any other procedural area. The law in this area has grown extremely complex, especially as domestic copyrights, trademarks and patents make up a large portion of our economy. It also poses vexing problems when copyrights and trademarks come in conflict with privacy rights and the First Amendment. Dreyfuss has been at the center of the cross section between intellectual property and civil procedure since she started as an assistant professor of law at NYU in 1983. She is now the Pauline Newman Professor of Law, and has published on subjects like the

impact of intellectual property laws in science, trade secrets, privacy rights and business method patenting. She recently coedited a book, *Intellectual Property Stories*, with Jane Ginsburg of the Columbia University School of Law. She edits a casebook in international property law that has to be updated every year because of constant changes.

Dreyfuss is currently one of three coreporters of Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes, a project for the American Law Institute. She, Ginsburg and François Dessemontet of the Center for Enterprise Law at the University of Lausanne are developing uniform guidelines to address the conflicting results arising in international copyright, trademark and patent disputes as the Internet makes worldwide distribution instantaneous. "If there is copyright infringement, there is copyright infringement all over the world. The question is, how does the copyright holder adjudicate those cases? Do you have to litigate in the United States over the people who downloaded it in the United States, and then litigate in France over the people who downloaded in France, and then litigate in Japan, etcetera?" It's not great for users, either, because they might be sued multiple times by copyright, patent or trademark holders.

Her research for the ALI addresses when it's appropriate to assert jurisdiction internationally and how to enforce judgments issued in one country against a violator elsewhere—if France issues a judgment against Yahoo (which happened), is that judgment enforceable in the United States? Dreyfuss also wants to introduce the principle that one suit can resolve claims all over the world. You can sue in the United States, for instance, asserting all worldwide claims but once you've lost, you're finished.

Samuel Estreicher, the Dwight D. Opperman Professor of Law and the director of the Center for Labor and Employment Law, joined the faculty after working as a union-side labor lawyer. In addition to serving as of counsel to Jones Day, he is currently the chief reporter of the ALI project *Restatement of Employment Law* with reporters Stewart Schwab, dean of the Cornell University Law School and Boston University School of Law Professor Michael Harper. The project is looking at nonstatutory employment law regarding issues such



"Civil procedure is about understanding the context in which a decision arises. Did the case come from a motion to dismiss? A summary judgment motion? That's a major part of a lawyer's arsenal when he gets a case on appeal."

SAMUEL ESTREICHER, Dwight D. Opperman Professor of Law

as the interpretation of employment contracts, noncompete clauses, privacy in the workplace and discharge of employees for violation of public policy.

Estreicher is also one of the nation's leading experts on alternative dispute resolution and an outspoken supporter of arbitration in employment disputes. Although he doesn't take a strict law and economics stance on conflict resolution, he repeatedly hits on the theme of middle- and lower-class access to relief. "There are two kinds of claims," Estreicher says. "Cadillacs and rickshaws." Cadillacs are high-stakes claims that attract lawyers and are well handled by the courts. Routine, or rickshaw, claims are low-stakes and therefore "are the orphans of the law." "Nobody wants them, neither private lawyers nor public interest organizations," Estreicher says. "The big challenge for the U.S. civil procedure system is to create a lower-cost process that transforms rickshaws into Saturns so people with average income and education can have a mode of redress."

ADVANCINC POSITIONS

A number of upper-level courses build on the foundation laid in the first-year Civil Procedure class. Barry Friedman, the Jacob D. Fuchsberg Professor of Law, teaches one of the more significant upper-level procedure courses, Federal Jurisdiction. In it, he explores the relationship between federal and state courts, and federal courts and other branches of the federal government. "The basic Procedure course introduces students to basic issues—notice, fairness and impartial judges, for example. I'm trying to introduce them to more complex issues."

And also to more complex strategizing. Friedman's course "is about how to get into federal court and how to stay there—or how to avoid being there if you don't want to be there." States named as defendants in cases challenging the constitutionality of state law, for example, would usually prefer to have the state court resolve the question. The preference for state or federal courts may change with the times and with the politics of the era, Friedman says, pointing out that there was a time when state courts were more sympathetic to gay rights than federal courts. "People will play to one court system or another for advantage," he says.

Friedman, Hershkoff and Neubornethe latter two teach the upper-level Federal Courts in addition to the first-year Procedure class-all look to the Guantánamo Bay cases as ripe examples for teaching the role of the judiciary in our tripartite government. For example, they cite efforts by Congress and the White House to eliminate Supreme Court jurisdiction over proceedings filed by detainees, and the question of whether you can eliminate habeas corpus review over proceedings filed by Guantánamo detainees. "These are perfect ways to teach the relationship between the judiciary and the executive branch, about the legislature," says Neuborne. "This is an excellent way to talk about the essential function of the judiciary."

Another perspective on federal courts comes from Estreicher. Two of his upperlevel classes, The Appellate and Legislative Advocacy Workshop: The Labor and Employment Docket, and Supreme Court Advocacy, give students "intense skill development," Estreicher says. In both of the seminars (he coteaches the appellate workshop with Laurence Gold, former general counsel of labor federation AFL-CIO and now of counsel to labor law firm Bredhoff & Kaiser in Washington, D.C., and the Supreme Court seminar with Meir Feder, a partner in the issues and appeals group at Jones Day and a former assistant U.S. attorney), students study cases that are pending before the Supreme Court. They write briefs, argue a side and decide the cases. "Civil procedure is about understanding the context in which a decision arises," says Estreicher. "Did the case come from a motion to dismiss? A summary judgment motion? That's a major part of a lawyer's arsenal when he gets a case on appeal."

PRACTICE, PRACTICE

Students get to apply the rules of civil procedure and see how their actions can affect lives when taking part in some of the Law School's clinics, including the Civil Legal Services Clinic, taught by Clinical Professor of Law Paula Galowitz; the Civil Rights Clinic, taught by Clinical Professor of Law Claudia Angelos; the Employment and Housing Discrimination Clinic, taught by Clinical Professor of Law Laura Sager; and the Children's Rights Clinic, taught by Fiorello LaGuardia Professor of Clinical Law Martin Guggenheim '71. Guggenheim was recently recognized with the Livingston Hall Award from the American Bar Association's Juvenile Justice Section for his years of practice in the area of juvenile delinquency. He also published What's Wrong with Children's Rights, a book-length examination of the quarter-century emergence of children's rights and its impact on families and society.

One of the most contentious political topics in the nation these days is immigrants' rights. Nancy Morawetz, professor of clinical law, shares a real-life perspective on civil procedure with her students in the Immigrant Rights Clinic that she coteaches with Research Scholar Mayra Peters-Quintero '99. Students have the opportunity to appear in several forums (such as immigration court or district court), advocating on behalf of immigrants in deportation matters, including three cases before the U.S. Court of Appeals for the Second Circuit during the 2004 academic year in which the students made creative arguments in habeas corpus. Students also work on wage and hour cases and nonlitigation matters, such as legislative issues and grassroots campaigns. The idea is to reinforce what's learned in the classrooms through actual practice. "A lot of what we are doing is trying to teach students to think strategically," she says. "We try to teach that the kind of choices you make will affect the way the
whole case is seen by the other side, is seen by the court and will affect your ability to ultimately achieve what you do and don't want to achieve for your client."

Morawetz, a former class action litigator, joined the NYU School of Law faculty in 1987. She assisted with preparation of an amicus brief on behalf of Jose Padilla, respondent in Rumsfeld v. Padilla, filed by the Public Defender Service for the District of Columbia. Padilla is a U.S. citizen that has been declared an enemy combatant. Morawetz developed an interest in the jurisdictional reach of habeas, which she examined in Padilla, after reading a former student's paper on similar issues. Morawetz specifically researched whether the government, by unilaterally moving someone from one part of the country to another, could choose the court in which the case would be litigated. The Supreme Court essentially ruled that it could.

THE ENDCAME

Law schools used to dedicate a full year to Contracts, Torts, Property and Civil Procedure. But as more subjects have been added to the curriculum-such as employment law, entertainment law and securities law, as well as interdisciplinary courses involving economics, philosophy and anthropology-top-tier law schools have reduced the first-year courses to one semester, including Civil Procedure. This has been quite controversial. Many professors believe that first-year law students take until around March to begin making sense of what they are learning. That is especially the case for Civil Procedure, which was cut back to one semester at the Law School in 2002.

Some faculty see the "semesterization" of first-year courses as emblematic of a larger shift by leading law schools away from their original vocational function of training law students to be lawyers. Instead, law schools are following the graduate school model, which is more academic and theoretical. "When I was in law schooland for most of my teaching career-a law school was thought to be a professional school, designed to prepare people for a professional life, with emphasis on the development of skills that reflected what lawyers did," says Arthur Miller. "These days, law schools do not have the same professional orientation that they once had."

Some professors at the NYU School of Law have had a tough time seeing the course truncated. Silberman initially refused to teach the shortened course for the first time in her 35 years at the school. (She also has taught or cotaught courses in conflicts of laws, comparative procedure and international litigation, and coteaches a class in international commercial arbitration.) She acknowledges that almost every other elite law school has reduced Civil Procedure to one semester, but still argued forcefully against it. "I gave a big speech to the faculty how this ought not to be done," she says.

After a three-year hiatus from Civil Procedure, Silberman returned to the fold in the 2005-06 academic year. She says she did so because she successfully insisted that her students meet four instead of three sessions per week-without adding to the requisite five weekly course hours-to give the students more time to absorb the material. But she also clearly loved teaching the course too much to stay away. "At the end of the day, I'm really most interested in craft. How do you make an argument? What's the best argument? What does the defendant say?" she says. "I'm really focused very heavily on students getting the tools that they need to move on to be a lawyer."

That dedication—to the students, and to learning in general—is at the heart of what makes the NYU School of Law such an exemplar of the teaching of civil procedure. Given their many years of experience, the Law School's civil procedure professors could be expected to have grown somewhat jaded about teaching a foundation course over and over again. Yet they talk about civil procedure with the enthusiasm of the newly initiated. Indeed, at the end of each year, Burt Neuborne burns his class notes to force himself to start fresh the following fall. "The only way I can be sure that I'll prepare again the next year is to be naked when I go in there and have to do it," he continues. "It's more work, but it's the joy of this life. Teaching law and teaching at NYU is just an unbelievably privileged existence."

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Heads of the Class



O ne of the most contentious questions in civil procedure is: How should we handle cases when many people are harmed? We gathered faculty and alumni who represent the academy, plaintiffs' lawyers and defendants' lawyers to debate the topic, and later added the comments of two other accomplished alumni who couldn't attend the roundtable. The group had a fascinating and free-ranging discussion—an edited version of which follows. (For those not immersed in this topic, see the glossary on page 43 for asterisked terms.) So, when something goes massively wrong, what sort of redress should Americans reasonably expect?

ARTHUR MILLER (AM): Probably the most dramatic current event in class actions is the enactment of the federal Class Action Fairness Act (CAFA)* of 2005. Let me start by asking the practitioners in the room whether they see any difference yet?

STEVEN BENNETT (SB): It's too early to tell. But the problem of forum shopping and a concentration of nationwide class actions in certain state courts may be ameliorated.

AM: Evan, do you predict a diminution in the number of class actions being instituted?

EVAN CHESLER (EC): I believe it will have little or no effect because there are a lot of smart plaintiff lawyers who will not be deterred. While it may affect venue, it will not affect volume.

MEL WEISS (MW): As a lot of other tort reform efforts have proven, there may be unintended consequences that may be more favorable to the plaintiff.

The truth is that there's more tort reform that's been effectuated at the state court level than at the federal court level. If you look at the statistics of Southern Illinois, you'll see very few actions that were certified as class actions. States like Mississippi and Texas have become very conservative. I still have trust and confidence that when federal judges see wrongdoing that affects adversely a lot of people, they are going to find ways to give them remedies.

AM: You're optimistic, whereas some viewed this as legislative work of the devil.

MW: I know, but the Private Securities Litigation Reform Amendment (PSLRA)* was also viewed as something that would benefit the corporate community and it turned out to be just the opposite.

AM: How about the academics? What does the rarified air say about this statute?

LINDA SILBERMAN (LS): I would have expected a movement toward more local-

ized state class actions. I also think you probably are going to see an effect on coupon settlements*.

AM: Why are you laughing, Mel?

MW: That's humorous because I have seen very few coupon settlements in my career. They are usually urged by the defendants, not by the plaintiffs. So now you've given us an excuse to say to hell with your coupons, we just want your cash.

OSCAR CHASE (OC): Now I'm laughing because it seems that every class of which I am a member—and I seem to get them every three months—offers me some kind of a coupon. In the consumer fraud area, it seems to endure.

AM: Maybe it's the cheap products you buy, Oscar.

MW: But the coupons may have real value and now, through the Internet, you can trade them.

oc: I will sell you some very cheap.

GEOFFREY MILLER (GM): I want to say a word in favor of coupon settlements because I've heard them denigrated here and elsewhere. They are not always bad. Some cash settlements are bad, too. Coupon settlements can be beneficial to the class in consumer products cases because they basically save the difference between the wholesale and the retail price, and that value can be shared by the defendant and the plaintiff. Even CAFA didn't repudiate coupon settlements. So let's not throw out the baby with the bath water.

AM: What of the argument that all CAFA

is, is a jurisdictional statute? It doesn't authorize the creation of a uniform body of federal common law for, say, consumer fraud or products liability. Because if it did—young Burt, you're the con law specialist at the table—is that as big an insult to federalism as you can think of?

BURT NEUBORNE (BN): Of course it's an insult to federalism. The Bill of Rights is an insult to federalism. It means that you have a single national law providing for minimum political rights all over the country. But when you consolidate large numbers of claims before a single federal judge in a single proceeding, you set off a process of the unification of law that could take lots of different forms. It could mean experimenting with federal common law, which really would have constitutional considerations, but it probably would mean looking at the various state laws and magically finding how they all come out the same way because federal judges will be viewing it under a lens toward uniformity instead of difference.

SAMUEL ISSACHAROFF (SI): CAFA is an invitation to take national market cases into federal court and nationalize them. That's the rationale behind the statute. We're



ARTHUR MILLER, MODERATOR Visiting Professor of Law; Bruce Bromley Professor of Law, Harvard Law School

going to see class action practitioners move further and further away from the old idea that they are simply trial lawyers in a different setting and into the world where they are sophisticated, complex litigators who go to trial infrequently and become increasingly comfortable with the practices of multidistrict ligitations (MDLs)* and federal courts.

GM: The assumption the business interests had when they promoted CAFA—that the federal forum would be better for

them than the state forum—isn't justified by the actual facts. Ted Eisenberg at Cornell and I actually did the research. We found that the attorney's fees in federal court, if anything, were higher than attorney's fees in class actions in state courts. So the idea that plaintiff's attorneys are going to suffer by going to federal court just isn't true.

LS: On the applicable law point: Of course, one of the reasons for CAFA was some sense that the state courts were certifying these broad national class actions in circumstances where they shouldn't be certified. Certainly one purpose politically was to think that the federal judges would

take a more objective and less parochial approach to those kinds of class actions. To the extent that you have consumer cases that involve the laws of different states, it may turn out that this is an inappropriate situation to have a nationwide class. Because different laws are applying doesn't mean absolutely that you can't certify, but if you look at the set of cases, the differences in applicable law have led in many cases to noncertification.

MW: How about the rebirth of subclasses? What Burt was saying before is that judges will try to find ways to harmonize different groups of state approaches and create subclasses. So you still have a coordination of the discovery and the efficiencies that class actions provide. But I just want to remind all of you that Rule 23* wasn't intended to be a one-way street. It also provided for the defendant an ability to take its misery and be rid of it in one package rather than have to fight hand-to-hand combat with each member of the class.

SB: That's a very realistic point. The law by itself doesn't do anything about establishing federal common law, but it may in fact encourage courts to look at circumstances where there are conflicting issues and try to figure out practical solutions.

HELEN HERSHKOFF (HH): Academics often say that procedure is a seamless web, meaning in this context that it is impossible to understand CAFA without looking at other procedural developments, in particular those having to do with limitations on implying remedies as a matter of common law for

statutory violations. When we look at CAFA, we can't just look at it as a jurisdictional statute. One has to locate it in the broader context and see it as a part of a broader shift in constitutional law and approaches to federalism.

AM: Helen, you have a great deal of experience in public interest litigation. Are you depressed about CAFA?

HH: Well, on the one hand, it's interesting that CAFA carves out an excep-

tion for class actions that have state governmental entities as the defendant. On the other hand, now that we've got the Supreme Court saying that removal of state law cases to the federal court counts as a waiver of the states' 11th Amendment immunity, it's not quite clear why we need that provision in the Federal Rules of Civil Procedure. We live in a period of privatization and deregulation. Yet CAFA invites state government to the table to discuss settlement. To me, that procedure offers one of the most interesting developments in the new class action statute.

MW: Do you consider that a good thing or a bad thing?

HH: That depends on your view of national government and on the standards that the court will use to approve settlement.



SHEILA BIRNBAUM '65 Partner, Skadden, Arps, Slate, Meagher & Flom: These government agencies will come in at the last minute with very little knowledge of what happened in

the case. It could delay or derail settlements. It could make a great deal of mischief.

MW: You're talking about the government as if it's one government, but under CAFA you have to give notice to a lot of governments. This is a very destructive influence over the resolution of complex matters.

EC: We should draw a distinction here between substantive law and procedure in the context of CAFA. Some of the most difficult and challenging class-action litigations I have handled have been situations where there have been multiple state court actions and you're trying on the defense side to get them all into the federal system. Not necessarily because it's a more favorable body of law, but because it is a much better context in which to defend a defendant who is

facing a multifront war in many different jurisdictions on many different time tables. From a procedural perspective to the extent that this results in more litigation going through the MDL process and the federal process, it is potentially a benefit from a defense perspective. On the substantive side, we still have profound conflicts among the circuits about things like loss causation. I don't think we're in any jeopardy of

having a single federal jurisprudence of class action litigation as a result of this statute.

AM: Some might not think it's jeopardy to move toward a single body. In fact, I've heard Sam say that *Erie v. Tompkins* should be overruled. That, of course, would put those of us who are academics out of work. What else is there to teach? Sam, does Evan make sense? **SI:** Evan makes a great deal of sense. First of all, it's clear that a lot of what we do, even in the world of common law, is try to figure out what the value is of a claim. We then look to the court system to facilitate the resolution of those claims as efficiently as possible. When you have an undifferentiated product put out on a national market and who it happens to hurt is just a matter of happenstance of where the consumer was at a particular time, there's a tremendous systemic push toward getting that resolved once and for all.

I disagree a little bit with Evan on the very good point that Helen made. The move toward consolidation of where these cases should be heard goes hand in hand with the increasing move toward the consolidation of the law that should govern national market conduct. But you can't look at the expansion of federal forum-not just in CAFA, but also in a case like Grable [Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.] that just came down-without also looking at the substantive areas like preemption where you get increasingly heavy-handed claims that the federal government standards should preempt state law. So you are seeing consolidation on both the procedural forum side and the substantive side.

AM: I did a complex litigation study 10 years ago in which it was anathema to think of a provision that didn't presuppose full adjudication on the merits. You get the feeling that people today are saying: Gee, it's all about workout*.

sI: Well, let's look at the reality of what goes on in the courts. One of the most disappointing decisions for somebody that teaches to first years is Justice David Souter's decision in Ortiz v. Fibreboard. I take strong issue with the way Justice Souter begins the opinion, which is to say, this is a departure from the one-by-one adjudication that we perceive to be the norm. Typically in America, says Justice Souter, you have one plaintiff, one defendant; each one has one lawyer. That's an absurd characterization of our legal system. Typically what we have in the U.S. is a complex web that includes bankruptcy, private aggregations and class actions. If you don't deal with all of that then you're just missing the picture of how law is practiced in this country.

AM: With deference to Justice Souter, whose entire life was New Hampshire, where life is a little different than in the big city, the vast majority of litigation today, I suspect, is still one-on-one. So are we in the process of creating a different structure—call it aggregation, call it the class action?

oc: Justice Souter's point goes to the



STEVEN C. BENNETT '84 Partner. Jones Dav realm of myth and concept of the legitimacy of courts. It's what people want to believe about what courts do. And it's not a bad thing for the courts to claim their legitimacy by this notion that we serve people one-onone. Why is that? Because unlike the U.S. Congress, which can punt on asbestos, the courts have to hear the case in some

way and have to find a way to resolve it.

SB: Lingering underneath this is the real divergence in interests in class action litigation, and that's compensation on the one hand and public interest or deterrence on the other. The Souter model of one-on-one is purely the compensation model. And it's clear that there is some public interest element written into the rules themselves, which is part of the whole reform process looking at how you select plaintiffs in the case of private securities litigation.

GM: We are on the verge of a revolutionary change in how we conceive of this type of litigation. We talked about rejecting *Erie*. We talked about moving from one-on-one adjudication to the idea of workout being the model. Actually, those things are already happening. If you look at federal court cases involving state law or even state law involving the law of several different states, they are rejecting *Erie* and are applying a single nationwide common law. They may not say that's what they are doing, but that is in fact what they are doing.

LS: That takes us back to the underlying question of the class action itself, because the very mechanism of the class action allows much of this litigation to be brought. At the end of the day, there's a really serious question about whether some of this litigation should be brought at all. If one looks, at least comparatively, we're one of the few countries that has this kind of class action. Other countries give much greater control to either public authorities or to a sign-on registry for a group litigation.

BIRNBAUM: The hardest problem the defense lawyer has is to get the court to separate the meritorious from the nonmeritorious cases. There always appears to be some semblance of causation for a small group of people, but then you have large numbers of people who can't establish causation jumping on the class action.

HH: I agree with Geoff that we are in the middle of a major sea change. Linda is pointing the way to which we might

be headed. Litigation has become increasingly a matter of administration. Linda raises the question, although implicitly, whether this administrative function ought to be under the domain of courts. Outside the U.S., bureaucracy assumes these functions. This development raises the fundamental political question that's posed by

Oscar's ideal: how far do we want to depart from the individual ethos of the U.S. legal system?

EC: From the perspective of a trial lawyer, one thing that is underestimated in that analysis is the prospect that a dispute will actually end up in a courtroom. If you hand this over to bureaucrats and you begin with the assumption that it will never be resolved in a courtroom—talk about unintended consequences that Mel started with. You fundamentally change the dynamic and not necessarily for the better.

BN: In Europe, when you have a social problem, the government will deal with it. And as Evan points out, that takes away the incentive from both sides to really seriously settle. You have a system in Europe that essentially tilts towards corporate power. But what we would do here is something very different. We'd say, let's decentralize. Let's see if we can privatize the enforcement process. The real analogy is not to administrative, it's to letters of marque*. Letters of marque once meant we had a private navy. And what we did is we simply licensed people to sail up and down the coast, take prizes, bring the prizes into a prize court, have the prize court determine the appropriate compensation. The profit mode created incentive for a very effective navy. Well, we don't want to spend the money, and

probably shouldn't, on a huge administrative mechanism to enforce the laws that we have in the country. So we've decentralized it. And modern class action lawyers are the contemporary equivalent of privateers. They enforce the law based on a profit motive. What we're talking about now is what the prize court should look like in terms of determining the ultimate compensation.

sI: Trials are tremendously important, but the problem is that right now in big cases, we have pseudo-trials-class certification of Daubert hearings*, for example-that increasingly run to be multiweek affairs. These procedural hearings take on a character of fighting the merits by proxy. One of the things that we are trying to figure out in the American Law Institute Aggregate Litigation Project is whether we can parcel out the components where Mel and Evan really have a difference and see if we can try them without having to try the whole thing at once and without having to have all the damages laid on. The hope is that the parties can then negotiate on the basis of the merits, but instead of calling it a Daubert hearing you'll call it a trial on an issue.

EC: This is not a phenomenon unique to class actions. There is a lot of attention these days on the vanishing trial. It is almost impossible to get a civil case though the federal system or most state courts to trial.

AM: The whole management dynamic works against trial. A chief judge of a distinguished urban federal court said to me, "If any case on my docket reaches trial, I have failed."

EC: The ultimate plenary trial on the merits is a very rare phenomenon. The difference here is, to go back to the Souter concept, when class actions are involved, what our system has done is to impose an entire additional level of policy-driven judicial oversight. Two private parties can go off, their lawyers can have a drink in a bar and it's over. You do not have to publish a notice in the *Wall Street Journal*, you do not have to have a fairness hearing, you do not have the court decide what the plaintiff's legal fees should or should not be. It is not subject to that level of public scrutiny.

MW: It's very dangerous for both sides to let the government get into the act. Defendants will rue it in very short order. When the Carter administration recommended

that you didn't even need a client to start a class action—a lawyer could bring the action—nobody wanted that. I hope that CAFA doesn't lead to a morass of engagement by state A.G.s, insurance commissioners—we can't even get coordination in a lot of states between different regulatory arms of the state.

GM: Burt, did your historical research show whether in letters of marque cases the priva-



EVAN CHESLER '75

Deputy Presiding Partner,

Cravath, Swain & Moore



Russell D. Niles Professor of Law

teer got paid on a percentage basis or on a loadstar basis?

BN: Traditional rule in admiralty was always a percentage.

GM: That's very important to think about. We've been talking about the idea that it's good to privatize mass dispute resolution in the U.S. through the judicial system, but at the same time they never get to trial, so we have sort of a paradox. Does this suggest that we ought to have arbitration as an answer? What about class action arbitration?

MW: It depends on what kind of procedural protection you put around it. The idea of walking into an arbitration without discovery with an arbitrator that you really don't know and you know it's the end of the line—there's no appellate court that's really going to do anything about it—is a very scary prospect.

KENNETH FEINBERG '70 Founder, The Feinberg Group: Actually, when it comes to mass torts, mediation has been much more effective than arbitration. In the class action



context, the mediator is often designated by the court to act as a special settlement master, with authority to attempt to secure a voluntary consensual resolution of the dis-

pute. This is what Judge Jack Weinstein did in the Agent Orange class action by appointing me. Mediation works best in mass torts where the litigation has sufficiently matured over the years—where there is a litigation track record concerning liability, causation and damages—so that the mediator can use litigation benchmarks to help forge settlements.

SB: The evidence about the efficiency of arbitration is quite mixed. Theoretically, it's very possible that an effective arbitration system as the backend of a class action actually might encourage more courts to certify class actions: if they knew that at the end of the day, we can resolve a major issue in the case through conventional trial of class-related issues, and then when we get to the individual compensation questions, that difficulty can be handled later through arbitration—it might actually be a good thing for plaintiffs.

MW: We are doing it now in the KPMG-Sidley Austin settlement where we have a procedure for the special masters to resolve certain compensation issues after the approval. We did it in virtually every one of the life insurance marketing fraud cases. And I would say at least 30 major cases were resolved that way that would have been impossible without using that methodology.

FEINBERG: Yes, we are seeing more and more use of binding procedures after an aggregate settlement is reached when it comes to issues of eligibility and compensation among individual beneficiaries of the settlement. Once a settlement is reached in an aggregative case (it need not be a class action, but could be the result of an MDL or regional consolidation), you still have the issues surrounding individual compensation. This is where the lawyers can agree to arbitration or some other binding process to allocate proceeds and determine eligibility. It also avoids the situation where plaintiff counsel are perceived to have an inherent conflict of interest in allocating settlement proceeds among numerous individual clients.

SB: The real question then is whether you need to do anything to the rules in order to make clear that courts have that opportunity available to them, or, whether it's already there. What I am talking about is a court saying at the outset, I'm not certifying this thing unless there is a process at the end of the case that will efficiently resolve the claims to compensation.

SI: We've had that for a long time in some areas of class actions. The B1 cases, which are the modern prize cases, in effect, have had that built in because of compelled participation. The pre-1991 Title VII cases had that because they had Phase 1, which was a liability trial done by the judge, and then Phase 2, which was handed over to a special master to adjudicate. The area that we've had trouble was in the tort-like cases. Here it is unclear, for the reasons that you've identified, Steve, what weight to give to

the two components: the public regarding component and the private compensatory component. One of the difficulties we are having in the class action law now is that post-1991, we've basically turned employment cases into tort cases and so now all of a sudden we have a great deal of difficulty figuring out how to handle even the routine Title VII employment disparate impact case.

BN: Taking my privateer theory a little bit

further, class actions are really an entrepreneurial-driven phenomenon, where what we've done is delegated to a series of private law enforcement officials, called plaintiffs' lawyers, the responsibility of organizing the enforcement of law in these areas, using the individual plaintiff as a symbolic entry into the courthouse. The notion that this individual plaintiff runs the case never was true. So, at some point we're going to have to confront the notion that the lawyers run these cases. And how we then work out the mechanisms is the very next step in class action laws.

MW: Let me just take issue with the overbroad statement that my good friend made. The PSLRA has introduced institutional investors as lead plaintiffs and class reps, and they are really taking a hands-on role in managing the lawyers in the case. The recoveries have become much bigger as a result. But it's manifestly unfair for a class rep to be the standard bearer for the judgment of the jury as to whether the whole class should recover. I have seen too many situations where the class rep turned out to be a blah. I just had a mock trial where I watched the deliberations of a mock jury; they put so much emphasis on the class rep's testimony, even if it really had nothing to do with the merits of the case, that it unduly prejudiced the rights of the absent class members.

HI: A minute ago Sam put employment on the table. But employment cases raise a different issue for this group—namely that certain industries are allowed to privatize procedure and opt out of the class action mechanism. In other words, corporations use private contracts that require workers to waive their class action rights. We've emphasized a number of important benefits that come from class actions—that they deter wrongdoing, create accountability mechanisms and compensate



HELEN HERSHKOFF Joel S. and Anne B. Ehrenkranz Professor of Law

victims of wrongdoing. What does this group think about allowing certain industries simply to opt out of the class action mechanism entirely? How will that affect corporate practices in the long run?

SI: We talk about class actions trans-substantively, but in fact we have different areas of law that are covered here. Securities cases make up about half the class actions in federal courts. Securities, after

the PSLRA, have real clients with real interests, and we've succeeded in turning them much more into old-fashioned representative litigation—that is, you now have one defendant and one institutional player on the other side and they basically are litigating against each other and everybody gets brought along in their wake.

In the areas where you don't have an institutional actor who can emerge, the arbitration issue has become the critical enforcement question. In a significant case out of the California Supreme Court last summer, the *Discover Bank* case [*Discover Bank v. Superior Court*], the



SAMUEL ISSACHAROFF Bonnie and Richard Reiss Professor of Constitutional Law

court said that if the effect of the arbitration is for practical purposes to deny any realistic enforcement mechanism—which it would be in a consumer small value case—the court would disallow compelled individual arbitration as contrary to public policy. This is a big issue in the courts right now.

oc: Helen does us all a favor by bringing this up because it does put the class action issue and the arbitration issue into a broader social context. It's not only labor cases, it's also consumer cases. We've all gotten notices from American Express telling us that we have to arbitrate and we can't have class actions. But you can't separate that out from such apparently unrelated events as the drop in the number of people in organized labor to about 13 percent of the working population. Or, that while laborer wages have stagnated in the last 15 or 20 years, CEO compensation has gone up 1,000 percent. This is part of the continuing marginalization of a certain class of society and in the end we are going to rue it. I wonder if that California case will survive some kind of review under the Federal Arbitration Act by the Supreme Court. Who controls the Supreme Court in the end is going to be as important as the way we draft these rules.

SB: Actually, that points to a much wider question, at least in the arbitration area. It's not really limited to employment. The Supreme Court has been saying ever since the '6os: Yes, you can arbitrate RICO, antitrust, securities law—but on the assumption that rights are being vindicated. The *Green Tree* [*Green Tree Financial Corp. v. Bazzle*] case a couple of years ago addressed the question: Would that mean arbitration without class action doesn't permit effective enforcement of rights? The court kind of punted on that subject. But that's a live issue outside the area of employment.

BN: The real issue is how level we want the playing field to be between relatively weak individuals who are confronting very strong institutions and who claim that the institutions have treated them shabbily. If you force the individuals to confront the institutions on a single member basis either through traditional Souter one-on-one litigation or, even worse, on the one-on-one actions of an arbitrator, you're going to have a situation where the institution always has a huge advantage. If I had to debate with Linda

the relative difference between the way Continental courts treat this and the way the U.S. treats this, Continental courts continue to force individuals to confront large aggregations of power on their own. The U.S. has worked out a mechanism where individuals can aggregate into classes. And by aggregating their power, they can confront large institutions with some relative degree of power. Are we going to dissolve those social institutions and send individuals back to having to confront large institutions of power on their own?

LS: I don't disagree with you, Burt. On the other hand, it really does go to the fundamental political question of whether these issues are to be decided by courts or by other branches of government.

AM: Burt, that was a subtle paean for the national class action. Don't you get the feeling you're on the deck of the *Titanic* right now?

BN: First of all, no one has ever accused me of being subtle. Yes, I'm on the deck of something, but no, I don't think it's sinking. The truth is, there's a huge discussion about the role of courts, how one assures there isn't unfair profiteering or unfair treatment of weak class members. Obviously if you are going to build a machine like this, the

machine requires some degree of policing. Rule 23 goes a very long way to providing that. But the notion of throwing the machine away and substituting individualized litigation or some form of arbitration strikes me as an absolute surrender of any chance of some sort of equality between the large numbers of individuals that confront the small number of powerful institutions in the society. AM: What about throw-



GEOFFREY MILLER Stuyvesant P. Comfort Professor of Law

ing the machine away and substituting statewide class actions?

BN: Well, we would have to talk about the relative loss of efficiency in moving to 15 or 20 litigations instead of one significant one. I have a hunch that will cost both plaintiffs and defendants money.

SI: An example is the Bridgestone/ Firestone case [In re Bridgestone/Firestone, Inc.] where a national class action was certified in federal court through an MDL in Indiana. It goes up to the Seventh Circuit. Judge Frank Easterbrook writes a very powerful, thoughtful opinion about how this is an invitation to the central planner model and this can't go forward as a national class action, so the plaintiffs lick their wounds and go running off into 50 state courts. And then Bridgestone/Firestone complains: We're getting slaughtered by the transaction costs of being in 50 different jurisdictions. They settle the case on a national classaction basis in a state court in Beaumont, Texas. So tell me what the gain was in terms of the integrity of the system at that point.

AM: All right, one anecdote for you, none for me. Just as a philosophical question: Should New Jersey have a nationwide Vioxx class action? I'm referring to the third-partypayer case that was just affirmed by the intermediate appellate court.

SI: If the question is, should Merck be accountable to the laws of New Jersey for its nationwide conduct, I have no problem with that whatsoever.

AM: Do you think judges would? I mean, this 50-state law issue has become the sword in the back of the plaintiff's head.

SI: We have to distinguish between where the battle lines are now and what the points of principle are. It is true that in all big class actions right now, everybody knows the drill. You fight over manageability and superiority. The way you do that is by the plaintiff saying, "We have 50 laws, but they're all the same. We have many facts

but they are all the same because at the end of the day the question is, are we all human beings or not?" If you can answer that question common to everybody, then you should certify. And then the defendants will come back and say, "Oh, no, we have 50 laws and they are so complicated and so different. If you went from New York to New Jersey you wouldn't even recognize the legal system." And then it's not

that we're all human beings. Some of us were born on Monday, some on Wednesday, there's no commonality at all. So this is the game we play. My view is, if it's national conduct, undifferentiated, let's deal with it one time and for all as a national case.

MW: The verdict against Vioxx didn't

only cover the personal injury aspect of the harm, but there were also consumer fraud issues that were given to the jury in their questionnaire. And the jury awarded even the person who wasn't given any money for the personal injury part, money for the consumer fraud part. Is that going to be collateral estoppel against Merck with respect to the third-partypayer cases or consumer fraud class action?

AM: It's a wonderful law school exam question. Also, it takes you back to the possibility of going to a test-case model where you may have a class action based in a state. If you do generate collateral estoppel, that certainly shortens the transaction cost for succeeding.

SB: That's right in theory at least, so long as state courts are willing to play some role in coordinating. If you know that in New Jersey there are 10 other cases out there and you have a way of taking account of which one filed first, which one is in the most appropriate position to go forward, there's no reason why a state court couldn't host a national class action and do just as fine a job as federal court. I don't suffer from the myth that every state court judge is incapable of figuring out what the law in some other state is.

LS: No, but I want to say a word in favor of federalism and the role of state laws. We do have state laws and there are differences in them. The notion that these should all be disregarded in the name of a national market seems to be wrong, unless Congress actually takes the step and decides we want these things regulated by federal law. That doesn't mean that you can't have a national class action if you can use, as Mel said before, subclasses. But it's a mistake to think, yes, there are three groups and it's now automatically a manageable class action. As for issue preclusion, you don't get issue preclusion if the underlying laws are different and there's a legal issue to be determined. Obviously if it's a factual issue you might well have nonmutual preclusion in some of these cases.

SI: The issue preclusion point is a fascinating one that is rarely addressed. If we take issue preclusion seriously, it is classwide litigation without the Rule 23 protections. There's a lot of pressure toward issue preclusion right now because everybody wants the efficiency. There's an interest-

ing opinion by former Judge Robert Parker of the Fifth Circuit called *In re Chevron* in which he says: If you want issue preclusion, you have to try a statistically robust sample and you have to make sure the sampling mechanism is proper.

AM: Judge Richard Posner's opinion in *Rhone-Poulenc Rorer* [*In re Rhone-Poulenc Rorer Pharmaceuticals Inc.*] is in the same philosophical vein that you shouldn't allow

an industry to swing on one jury verdict.

EC: There is one other respect in which issue preclusion is not just Rule 23 class action without Rule 23. From the perspective of trying the cases, when you are dealing with issue preclusion you have to win every time and you only have to lose once. In a class action situation, it may be that there's only one trial, but you only have to win once. And that's a fundamental difference.

LS: But, Evan, to pick up on Arthur's point, the notion that you're going to have a single jury that's going to decide a critical issue in this national class action and have the potential viability, as Posner put it, of this company turn on a single jury verdict it's one of the problems with the notion of having a single nationwide trial and that's

why, at the end of the day, he resists a national class. With respect to issue preclusion, that's why we don't use nonmutual issue preclusion in these cases where there are multiple suits and potentially inconsistent findings.

EC: I'm not necessarily advocating one over the other. What I'm saying is that they are two very different models. It may well be a far more dangerous, treacherous path to put all of the eggs of the reso-

lution in one basket and try the case once. I'm just saying it's not so easy to compare them as either/or substitutes for one another because there is this entire other dimension of having to resolve the disputes in 5,000 cases versus one case.

MW: It depends on what forum you're in. If you're in an MDL forum and the judge is coordinating a lot of individual cases, there are decisions made along the line by both sides that give more procedural protection that you are picking the right case or cases to test the waters with it. Let me just show you an example. I just coined a new phrase for the IPO cases that I have: a mass of class actions. We have 310 separate class actions, each with its own lead plaintiff, arising out of similar conduct, taking place during the same period, that we allege to be industrywide. As a result of judicial economy we have 310 separate class actions in one forum. Who's at the front of the line for adjudication and who's at the back? And how do you settle with defendants fairly to take into account this alignment that was sort of forced upon us for judicial economy purposes? These are very challenging jurisprudential issues that are both procedural and substantive in nature. I think the courts are probably the best forums to deal with it.

oc: But are they? When you talk about massive class actions, nothing is more massive than the asbestos scenario in terms of the number of people harmed, the number of cases and so forth. Justice Helen Freedman in New York County has something like 10,000 cases in front of her. These cases will never be tried. Do we need a new procedural vehicle? Is there some way that these people who have suffered real harm and deserve compensation can get it in the legal system that we have?

SI: We have section 524(g) of the bank-ruptcy code, which says, bring the asbestos

cases into bankruptcy Judge Anthony court. Scirica in the In re: Combustion Engineering case in the Third Circuit writes an opinion in bankruptcy that, if one did not know it was a bankruptcy case, would pass for a Rule 23 decision. Okay, you want to kick it out of bankruptcy, we go back to the model where you have a private claims resolution facility set up by the defendants and the consolidation of all these cases in the

hands of private lawyers, something that is completely nontransparent. These are serious problems, but it is institutionally irre-



Martin Lipton Professor of Law



MELVIN WEISS '59

Senior and Founding Partner.

Milberg Weiss Bershad & Schulman

sponsible for the courts to throw up their hands and say: Oh no, this is not the Johnny-punched-Freddy case that we would like to have in our courts.

HH: You say that Oscar's approach would be nontransparent, Sam, but of course that's only because we've designed the administrative remedy in a nontransparent way. We can use our creativity and imagination to



BURT NEUBORNE Inez Milholland Professor of Civil Liberties

create and establish new forms of administrative procedures that could be more transparent and would deal with some of the problems we currently face.

SI: As long as the political branches are not willing to step up to the plate. Look, we have not gotten asbestos reform for good reasons and for bad reasons. We got black lung reform and it turned out to be a way of passing the liabilities from the private entities to the taxpayers. Maybe we should do that with asbestos also, just say okay, just have public liability.

BIRNBAUM: It's time to handle asbestos through a different system than litigation. It's very costly and erratic. Some people get more than they should and others less. An administrative system, even funded privately, would be more effective and efficient.

SB: Just to add to Helen's point on transparency, you don't have to view the arbitration system, just because it has traditions associated with it, as incapable of change. For example, the National Association of Securities Dealers just recently came out with a rule that essentially says that we are going to require arbitrators to issue opinions that explain what they are doing. That's entirely within the power of those who are creating these systems.

oc: We haven't talked about the 9/11 settlement forum and Ken Feinberg's work, but it seems to me that was an imaginative, fairly transparent system and if you compare the World Trade Center bombing in 1993, which I believe has still not come to final resolution, with the handling of the 9/11 disasters, people have been paid.

SI: Because we are not taking money from a defendant to pay for it. Any time that we want to take public money and distribute it generously, we can figure out the procedures, but I'm not sure how much we can generalize from that.

HH: We haven't focused on litigant satisfaction. How do the consumers of

justice in the U.S. feel about the legal system? It's not clear to me that litigants in large class actions, or even in small individual one-on-one cases, feel either a sense of consumer satisfaction or—more important—a sense of citizen satisfaction—of trust and security—that a democracy should encourage

SB: We actually have available to us readily at

hand and widely used, a system to permit much more communication and participation, and that is the Internet. It is theoretically possible to have some sort of mandatory information communication system that says that if you're going to have a class action, we're going to put every darn document up on some Web site with somebody explaining what's going on, with a blogging system to allow people to comment on it.

SI: Courts are doing that. That's becoming a routine part of the order and it's really changing the world in two ways. One is that clients now are in chat rooms among themselves and they are talking about the lawyers, the settlement, what other lawyers are offering them, and so it's empowering clients. The other is that it's transformed the way in which you do business. I was heavily involved with the fen-phen litigation. And when we settled on a national basis, we had to notify a class of six million people. There was no way of finding them because many got prescriptions from doctors in fly-bynight clinics. We did a national ad campaign that said: Here are the forms, download them off this Web site. We had 1.3 million hits and close to a million downloads in a one-week period.

AM: Mel, the Holocaust cases, which you are deeply involved in, as was Burt, was the class that never could have been certified. You know it, Burt knows it. What was that all about?

MW: We had an opportunity to raise an issue that hasn't been dealt with in 50 years. An analysis was made of the treaties that had been entered into that gave us a ray of hope. It is obvious to all of us that we might have problems covering all the victims, but we used the lawsuits as a mechanism to get the attention of governments and we were able to integrate their help into the litigation process. We settled the Swiss bank case as a class action; whereas in the German slave labor cases, we used an executive order approach rather than a class resolution. But the resolution was basically the same. During the deliberations, which took place in the state departments of Germany and the U.S., we included a lot more people into the resolution than really had an ability to get their claims adjudicated because the companies that they had worked for were no longer in business. Money was being put up by governments as well as companies to try to remedy the situation. At the end there was a recognition that without the lawyers, and without the ability to spark the resolution through litigation, there would have been no recoveries.

AM: An interesting illustration of the use of litigation for political, social and emotional objectives. Thank you all.

Cheat Sheet

CAFA: The Class Action Fairness Act of 2005 was enacted by Congress to reduce "abuses of the class action device" that "harmed class members," "adversely affected interstate commerce" and "undermined public respect" for the judicial system. The act amends Rule 23 of the Federal Rules of Civil Procedure.

COUPON SETTLEMENTS: A form of class action settlement in which class members receive coupons for future purchases of goods or services from the defendant, but class counsel typically receives a monetary award in the form of attorney's fees.

DAUBERT HEARING: A hearing conducted by a judge to determine the validity and admissibility of expert opinion testimony.

LETTERS OF MARQUE: Written authority granted by a government to a private person that allows for the seizure of goods or citizens from another state. What they amounted to were licenses for private persons to arm a ship and seize goods from an enemy; such persons were then called "privateers."

MDL: Multidistrict Litigation is when a number of civil actions involving common issues are transferred to one particular federal district court. Cases may be transferred for coordinated or consolidated pretrial proceedings.

PSLRA: The Private Securities Litigation Reform Act of 1995 was enacted by Congress to amend the federal securities law to reduce "abusive litigation" and "coercive settlements" as well as to provide new rules for auditors to detect and disclose corporate fraud.

RULE 23: The Federal Rule of Civil Procedure that governs class actions.

WORKOUT: An agreement or set of agreements worked out between a debtor and his or her creditors for payment of debts—usually to avoid bankruptcy.

PHOTOS BY LEO SOREL



PORTRAITS OF A LAW SCHOOL: "I'm honored to have been able to hire 18 incredibly talented new colleagues since becoming dean in 2002," says Richard Revesz. Here, in alphabetical order, is a gallery of these stellar professors: 1) Jennifer Arlen, 2) Oren Bar-Gill, 3) Rachel Barkow, 4) Lily Batchelder, 5) Stephen Choi, 6) Kevin Davis, 7) Cynthia Estlund, 8) Roderick M. Hills Jr., 9) Daniel Hulsebosch, 10) Samuel Issacharoff, 11) Deborah Malamud, 12) Florencia Marotta-Wurgler, 13) Smita Narula, 14) Cristina Rodríguez, 15) Margaret Satterthwaite, 16) Robert Sitkoff, 17) Jeremy Waldron, 18) Katrina Wyman.



Frank Henry Sommer Professor of Law Ronald Dworkin, center, holding his commemorative crystal gavel with Dean Richard Revesz, left, and 2006 Annual Survey of American Law editor-in-chief Malachi Boyuls.

Annual Survey Honors Dworkin

ome were friends and colleagues; others were intellectual adversaries of one of the most noteworthy and frequently cited legal philosophers of the past century. All came together to honor Ronald Dworkin when the 63rd



volume of the Annual Survey of American Law was dedicated to him on April 17. With this award for his exceptional role in the study and practice of law in the United States, Dworkin, the Frank Henry Sommer Professor of Law, joins the ranks of honorees such as Supreme Court Justice Antonin Scalia (2005), Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit (2004), Attorney General Janet Reno (1998) and Supreme Court Justice Thurgood Marshall (1983).

During the dedication ceremony, hosted by Annual Survey editor-in-chief Malachi Boyuls 'o6, Dworkin's colleagues-University Professor Thomas Nagel; Judge Posner; Professor Lawrence Sager, who has since become dean of the University of Texas School of Law; Professor Thomas Scanlon of Harvard University; Lord Hoffmann of the House of Lords; Robert B. Silvers, coeditor of the New York Review of Books; and then-Columbia, now-NYU University Professor Jeremy Waldron-reminisced about "Ronnie's" long and illustrious career. The portrait that emerged was of a man as intellectually relentless as he is charming. "He is a person single-handedly swimming against the tide to keep up and raise the standards of our collective political life," commented Scanlon.

One of the ways Dworkin, who is also

the Jeremy Bentham Professor of Law and Philosophy at University College in

London, has challenged the intellectual community is by creating the ground-breaking Colloquium in Legal, Political and Social Philosophy, which he has run since 1987 with Nagel.

Sager described it as a rare, sometimes masochistic opportunity for scholarly assistance. He recalled one academic who, after a take-no-prisoners analysis, responded to the colloquium's attentions by turning his back and crouching in a fetal position. "Ronald has a dogged insistence to get to the bottom of things," Nagel said. "His is a ruthlessness of ideas."

There has been pain, but also gain. "I believe that everything that I have written bears the improving mark of those rigorous sessions, and if there is an ounce of egalitarian good sense in my book on property and my subsequent writings, it is Ronald Dworkin's responsibility," says Dworkin's former student Waldron, a frequent colloquium visitor, who will coteach the series this year, his first as an NYU professor.

For his part, Nagel confessed that he learned something new about Dworkin when he read the Law School cover story about his old friend last fall. After his federal appeals court clerkship with Judge Learned Hand, Dworkin opted to work for Sullivan & Cromwell rather than clerk for Supreme Court Justice Felix Frankfurter. Nagel imagined an alternate reality, in which Dworkin had pursued a different path. "I'd like to thank Sullivan & Cromwell," said Nagel, getting a big laugh, "for enriching our philosophical lives and for giving me the friend and colleague with whom it has been such a joy to work."

Hoffmann was equally appreciative of Dworkin's contributions. He described how Law's Empire (Harvard University Press, 1986), Dworkin's masterwork on the judgment of particularly difficult cases, "offered the best explanation for what I was trying to do." Dworkin's latest book, Justice in Robes, breaks new ground and deals with the balance between judges' personal morality and their legal reasoning.

Silvers, Dworkin's longtime editor at the New York Review of Books, needed only to list some of the most impressive of Dworkin's 57 articles—"The Jurisprudence of Nixon," "Women and Pornography" and "The Threat to Patriotism"—from the past 38 years to show how the works provide a "skeletal history of the times."

The audience chuckled when Posner. whose relationship with Dworkin has been characterized by what he called "antagonism and antipathy," said, "To be an invited skunk at a garden party is an unusual experience; one that argues generosity on Professor Dworkin's part, or perhaps a spirit of mischief on the part of the editors."

"The editors have shown great wisdom in choosing Dworkin," noted Dean Richard Revesz. "I was so pleased when they asked, 'Do you think this would be okay?' I thought, this is more than just okay, this is great!"



Richard Posner, left, Thomas Nagel, center, and Jeremy Waldron were just some of those praising Dworkin.



David Garland will use his fellowship to study the death penalty and why it persists in American society.

Garland Gets a Guggenheim

ast April, David Garland became the most recent Law School professor to be awarded a fellowship by the John Simon Guggenheim Memorial Foundation. With this honor he joins the ranks of Ronald Dworkin, Thomas Franck, Stephen Holmes, Thomas Nagel, William E. Nelson and John Phillip Reid.

Garland, the Arthur T. Vanderbilt Professor of Law and a professor of sociology, will use his award to pursue his sociological research on capital punishment and American society. He says he will try to understand the persistence of the death penalty in America, explain the system's "strange forms and peculiar characteristics" and examine how the system actually functions in American culture and society.

"David is one of the world's best sociologists working in the criminal justice field," says Professor Bryan Stevenson, a nationally recognized expert on capital punishment and director of the NYU School of Law's Capital Defender Clinic in Alabama. "His writings on the American death penalty have been brilliantly illuminating."

Weiler's Inaugural Lecture: "The Binding of Joseph"

For his inaugural University Professorship lecture, Joseph Weiler chose to explore a biblical theme, as he had in his 2002 inaugural speech as the Joseph Straus Professor of Law. His talk, "The Binding of Joseph," focused on an oft-overlooked passage of Genesis in which Jacob sends his son Joseph to check on his brothers, putting him in harm's way. Utilizing episodes from Oedipus Rex, ancient and modern biblical and theological scholarship, and modern notions of sacrifice, Weiler proposed a radical interpretation of the narrative: Jacob may be a reckless father for consciously putting his son in danger, but his limitless faith coupled with self-skepticism and humility make him an admirable model for the religious character.



It's All Academic

G etting an entry-level teaching job at an accredited law school isn't an easy task—only about 110 of the more than 1,000 applicants each year succeed. But the Law School is beating the odds.

According to the recent *Entry Level Hiring Report* by Professor Lawrence

Solum of University of Illinois College of Law, 12 job-seekers with NYU J.D.s found teaching spots in 2006—representing the fourth highest placement number among all law schools. An additional nine candidates with NYU graduate law degrees,



Terry Maroney

fellowships or acting assistant professorships were hired as well. New hires found positions at schools such as Cardozo School of Law (Margaret Lemos '01), NYU School of Law (Florencia Marotta-Wurgler '01), USC Law School (Shmuel Leshem (LL. M. '02, J.S.D. '05)) and Vanderbilt University Law School (Terry Maroney '98).

The credit goes to the two-year-old Academic Careers Program (ACP) run by Crystal Olsen Glynn and Jacob D. Fuchsberg Professor of Law Barry Friedman, who also directs the Furman Academic Program. Glynn and Friedman help candidates organize their scholarship, CVs and credentials for the annual American Association of Law Schools (AALS) hiring conference in Washington, D.C. The ACP also runs a "job camp" each fall to demystify the hiring process. Maroney, who defended her paper, examining the effects of mood disorders and brain damage on an individual's competence to stand trial, before Professors Oren Bar-Gill, Rachel Barkow and David Garland at the last job camp, says: "I received important commentary from faculty and other candidates and my paper eventually got to the level it needed to be. Doing the moot job talk prepared me to think on my feet while at the AALS hiring conference."

"You can't enter the market without years of preparation to make yourself a viable candidate," says Sam Buell '92, a former special attorney for the Department of Justice's Enron Task Force, who contacted the ACP after deciding to pursue a career in teaching. "I'd liken the legal market for teaching to the NFL draft, or qualifying for the PGA Tour." With the help of the ACP training, Buell made the cut. This fall, he will teach Securities Regulation and Criminal Law at Washington University School of Law.

Cassese Named a Judge; Noble Reelected

Sabino Cassese and Ronald Noble, both law professors from the NYU community, recently won major appointments in organizations abroad.

Cassese, a Global Visiting Professor of Law, joined the Constitutional Court of Italy on November 9, 2005, five days after his appointment by then-President Carlo Ciampi. A professor of administrative law at the University of Rome-La Sapienza and the former director of its Institute of Public Law, Cassese also served as Italy's minister for public administration. He is a prolific scholar, specializing in administrative law history, the European Union's administrative structure and the role of independent administrative authorities.

Last September, Ronald Noble, an NYU School of Law professor on leave, was appointed to a second five-year term as Interpol's secretary general. The vote, by the Interpol General Assembly, was unanimous. "I know Ronald Noble to be a tireless worker, a leader and a visionary who is deeply committed to the goals of Interpol," said Jackie Selebi, the organization's president. Noble has served as both assistant secretary and undersecretary for enforcement for the U.S. Treasury, deputy assistant attorney general for the Department of Justice and president of Interpol's Financial Action Task Force.



Sabino Cassese

Voble: Associated Press

Golove Gives First Hiller Family Foundation Speech

iller Family Foundation Professor of Law David Golove delivered his timely and provocative inaugural lecture last spring, "A Constitutional Law of Foreign Affairs for the 21st Century." Golove, who is also director of the J.D./LL.M. Program in International Law and a faculty codirector of the Center on Law and Security, examined instances in U.S. history when the executive branch has overreached during wartime and made comparisons to the counterterrorism tactics of the Bush administration.

Take the Bush administration's decisions to eavesdrop on U.S. citizens without warrants, to utilize torture and extraordinary rendition in intelligence gathering, and to detain prisoners indefinitely without formal charges. Golove argued that James Polk's provocation that began the 1846 Mexican-American War and Franklin Delano Roosevelt's disregard for the 1930s Neutrality Acts that led to U.S. involvement in World War II were precedent-setting examples of emboldened imperial war powers, but that the current administration has far exceeded them. "This administration's approach is like a perfect storm in which developments in a variety of areas come together to achieve a radical departure from past practices," said Golove.

For the president and his administration to act without the authorization of Congress during a time of endangered national security not only denies the public a chance to debate a critical topic, said Golove, but implies that the action itself is questionable. "Congress would be inclined to give [the president's] views substantial weight,



if not to defer outright," he said. "If he can't make the case to Congress, then we should be doubtful that violating the laws of war is really a good idea."

After the lecture, Golove took questions from the audience. At the end, a young man raised his hand and asked why Congress can restrain the president, but isn't subject to the same short-term checks itself. Congress's decisions are subject to scrutiny through public debate, Golove explained, trying not to smile too broadly. The question came from his 13-year-old son, Lewis, whom he calls his "most acute critic." Says Golove: "I drive him to school every morning. I have a captive audience and run all my ideas past him, and this is what he does to me every single time!" A fitting way to end a discussion of checks and balances.

A First: Writing Clinic for Clinicians

ore than 60 clinical law teachers from across the country convened this spring at NYU for the first Clinical Writers' Workshop. Sponsored by the Clinical Law Review (founded by NYU, the Clinical Legal Education Association and the Association of American Law Schools), the workshop was created to give busy clinicians a rare opportunity to focus on academic writing skills.

Those skills are increasingly important, said one of the workshop's facilitators, Jane Aiken '83, the William M. Van Cleve Professor of Law at the Washington University School of Law, as more clinical law teachers pursue tenure-track positions where publishing is necessary for success.

Workshop participants were divided into small groups so that their work could be thoroughly reviewed and critiqued in the day-long workshop. Barbara Fedders '97, a clinical instructor at Harvard Law School's Criminal Justice Institute, was part of a group that focused on the collateral consequences of convictions. She presented a draft of a paper on youths required to register as sex offenders. "I had some real questions about whether what I was doing was going to work, whether it made sense, whether it had coherence and integrity and whether anybody would want to publish it," she said. "The workshop was just greatinspiring and motivating."



Coeditors of the Clinical Law Review Professors Randy Hertz of NYU, left, and Katherine Kruse of the University of Nevada-Las Vegas

AUTUMN 2006

Remembering Chester Mirsky



Chester Mirsky with Dean Richard Revesz at the end-of-the-year faculty dinner in May 2002.

James B. Jacobs, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, fondly recalls his friend and colleague Chester Mirsky, professor of clinical law emeritus, who died on March 8, 2006.

het and I met in September 1982 when I came to NYU from Cornell on a "look see" visit. We became friends almost immediately and shared our professional and personal lives for the next 20-plus years.

Chet was brilliant and charismatic. He overflowed with ideas. Politically, he was a "lefty," but more iconoclast than ideologue. He liked being controversial and even relished conflict. However, he was warm and likable, even lovable. He was constantly in motion, usually talking with his hands, often excoriating some recent outrage, hypocrisy or irony.

When I signed on to NYU, agreeing to revitalize the criminal justice research center, the dean and several colleagues encouraged me to nominate a visiting criminologist to help launch our program. That's how Mike McConville came to NYU and changed Chet's life. Mike immediately recruited Chet to collaborate on a study of indigent criminal defense services in New York City. Their book-length empirical study, Criminal Defense of the Poor in New York City (1986), was highly critical of the NYC Legal Aid Society, one of the liberal establishment's most sacred cows. The LAS leadership, board members and friends, even members of the Law School faculty railed against Chet and Mike-and sometimes me by association. The denunciations and criticisms energized Chet and Mike. They flourished in the controversy, meeting every criticism with more evidence. Their study is now regarded as a classic in the field.

Chet was an inspiring teacher with superb oral advocacy skills; he was fast, agile and articulate. With students, he was friendly, even avuncular. He organized the criminal procedure course around roleplaying exercises. There was electricity in the air as students argued motions and presented evidence. We had many wonderful students including Malcolm Spector '94 (a noted sociologist before attending law school), who later became one of Chet's closest friends and a great source of support during Chet's battle with cancer.

Chet helped me launch and sustain the monthly Fortunoff (now Hoffinger) Criminal Justice Colloquium. He attended every session, even though it meant he wouldn't get home until after midnight. Sometimes he stayed the night at our home. I loved critiquing the colloquium with him over a late-night brandy.

Chet leaves an indelible imprint on the Law School. With Harry Subin, he was cofounder of the Law School's first clinic. From that seed, the NYU clinics grew into the top clinical law program in the country. He also leaves behind some first-rate scholarship, including two books with Mike McConville, a federal criminal procedure book with Harry Subin and Mega-Mall on the Hudson with David Porter. Most important, Chet leaves his passion for justice and his strategies for criminal defense in the hearts and on the minds of hundreds of New York University School of Law graduates who will carry forth his ideals and pass them on to their students and protégés.

Gulasekaram Wins Ladas Memorial Award

A cting Assistant Professor of Lawyering Pratheepan Gulasekaram received the Ladas Memorial Award from the International Trademark Association at its annual May gathering in Toronto.

The award, which includes a cash prize of \$2,000, goes to the best paper on trademark law or an issue related directly to trademarks. Gulasekaram won for "Policing the Border Between Trademark and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works," published in the *Washington Law Review* in 2005. In the paper, he argues that if trademark law, precedent and the First Amendment are properly analyzed and interpreted, creative works using trademarks and trademarked products for humor, cultural criticism, parody or shock value should be protected, and that trademark owners who sue the creators of such works "should rarely, if ever, prevail in such actions."



Professor Pratheepan Gulasekaram, standing left, with guests at the International Trademark Association gala.



Accolades for Amsterdam

niversity Professor Anthony Amsterdam received the Outstanding Scholar Award from the Fellows of the American Bar Foundation in Chicago on February 11.

Amsterdam has said that he was clerking for Supreme Court Justice Felix Frankfurter in 1961 when "a sense of justice woke up inside of me." He took on school desegration, First Amendment and civil rights cases, and, in 1972, won a Supreme Court case overturning all death penalty statutes. The Court later reaffirmed the constitutionality of capital punishment, and now Amsterdam advises capital defendants' lawyers. Former Law School Dean Norman Redlich (LL.M. '55) wrote in his nomination, "Amsterdam has written, or edited, more briefs in opposition to the death penalty than can be listed here.... I cannot think of anyone more deserving of the [award]."

Amsterdam joined the Law School in 1981, as the director of the Clinical and Advocacy Program, and played a pivotal role in the inception of the first-year lawyering course. His scholarship includes research on lawvering theory, civil rights and criminal procedure. Says Professor Randy Hertz, current director of the Clinical and Advocacy Program: "What is perhaps most astonishing about Tony is that his brilliance as a scholar is fully matched by his extraordinary talents and accomplishments as a teacher, public interest lawyer for those most desperately in need of help, and mentor and adviser to law students, practicing lawyers and a host of others. He has been-and continues to be-a beacon of hope for subordinated clients and a shining example for generations of lawyers and law students."

The Great Stonewall of China

BY JEROME A. COHEN *This op-ed appeared in the* Wall Street Journal *on April 15, 2006.*

G iven the Bush administration's long list of foreign policy priorities, and widespread American concern about U.S.-China business and security problems, Chinese President Hu Jintao may believe his government's repressive criminal justice system will get light scrutiny during his forthcoming visit to Washington. He is likely to be disappointed.

The U.S. has too much at stake to ignore abuses in China's courts—and American business counts on Beijing realizing its promise to develop a genuine rule of law. The Bush administration has rightly spoken out on behalf of victims of a system that is out of sync with China's economic and social progress. Reformers within the ranks of the Communist Party and government who are struggling to bring the judicial system up to world standards have welcomed this international support.

China's conservative leaders have increasingly relied on criminal and administrative punishment to suppress rising demands for social justice, honest government, political participation and religious freedom, especially among those who feel left behind by the country's rapid modernization. In these circumstances, and except for a belated effort to rein in a death penalty process that is notoriously out of control, the nation's leaders have refused to approve a host of urgently required reforms. Actually, the leadership is badly divided about law reform as well as other important aspects of political reform. This lack of consensus extends not only to proposed constitutional, legislative and regulatory innovations but even to the handling of individual criminal cases.

Nothing better illustrates the current stalemate at the top than the pending case of Zhao Yan, an able Chinese staff member of the Beijing Bureau of the *New York Times*. Mr. Zhao was detained on September 17, 2004, by the Ministry of State Security—China's version of the Soviet KGB. He was detained for allegedly leaking state secrets to a foreign organization, a charge that could result in a long prison sentence, possibly even the death penalty.

Mr. Zhao was suspected of informing the *Times*, before other media learned of it, that former President Jiang Zemin was about to step down from his remaining post as head of the Military Affairs Commission. The newspaper published the report, which turned out to be accurate, and reportedly infuriated at least one top leader. But the *Times* denied that Mr. Zhao had been one of its sources.

Although this case, like others said by the police to involve "state secrets," has been almost totally non-transparent (for a long period Mr. Zhao was denied access to a lawyer or anyone else), it became clear that the investigators had turned up no significant evidence to support their suspicion. The only item cited to "prove" his involvement was a brief memo written by him about a leadership power struggle that had nothing to do with the report in question and that had been illegally seized from the *Times*'s files.

Yet by any interpretation of China's ambiguous and flexible criminal procedure code, the time limit for continuing to detain Mr. Zhao was about to expire. At that point, the police, rather than release him for lack of evidence, resorted to a familiar



technique for extending their custody of a suspect. They charged him with another offense, defrauding a friend, not normally a matter of concern for the secret police. This started the clock running again.

At long last, under a hail of criticism from abroad but under evident command from on high, the police recommended prosecution on both the state secrets and fraud charges; and the procurator issued an indictment on both counts. Yet, once again, the case encountered long and unexplained delays, this time in holding the trial. Finally, on March 17, the last working day before the ultimate deadline for a timely trial, the Beijing Intermediate Court issued a surprise decision approving an unusual request by the procurator to withdraw the indictment on the ground that it needed to supplement investigation of the fraud count. Amazingly, the court order said nothing about the impact of this decision on the state secrets count.

Defense counsel immediately asked the judge in charge whether the court's decision also meant withdrawal of that count, and he was told that it did. Under Chinese law this should have resulted in Mr. Zhao's release, or at least a more relaxed restraint under house arrest or bail. Yet nothing has happened in the intervening weeks, despite defense efforts to highlight the apparent lack of legal authority to continue holding Mr. Zhao.

The matter is obviously out of the realm of the courts. Yet in this case the political leadership seems to be in extraordinary disarray, incapable of agreeing upon what it should tell the judiciary to do, as it normally does in important cases. When the Foreign Ministry was asked for clarification, it claimed to be uninformed and surprised. Later its spokesman would only say that the foreign press had misconstrued the situation in predicting that the court order would lead to Mr. Zhao's release. Since then, there has been nothing but a wall of silence.

President Hu will soon be exposed to potential questioning by sophisticated American audiences. This time they may not accept the Chinese leadership's customary hypocritical response that "the case is under consideration by the judicial authorities" and therefore discussion would not be appropriate. Or will Zhao Yan join the ranks of so many other forgotten Chinese prisoners because our officials, media, business representatives, think tanks and universities allow President Hu to stonewall?

Cohen is an NYU law professor specializing in China and an adjunct senior fellow for Asia at the Council on Foreign Relations. He is a consultant to the New York Times in the Zhao Yan case.



God, Government and You

BY NOAH FELDMAN This op-ed appeared in USA Today on October 17, 2005.

M ichael Newdow, a California atheist, has gained plenty of notoriety over the past few years. He got a case all the way to the U.S. Supreme Court contending that children in general—his daughter in particular—must not recite the words "under God" in the Pledge of Allegiance in school. Why not? Because he believes the words, which were added in 1954, violate the separation of church and state.

You may have thought Newdow had gone away. After all, the high court threw out the case because he doesn't have custody of his daughter. But he's back, making the challenge again on behalf of the parents of other children. A lower federal court has already ruled in his favor.

Newdow is once again raising hackles and crystallizing just how much a quintessential question—one the Framers of the Constitution thought they had nailed—has returned to tear at the very definition of what it is to be an American. It's a question that's more divisive today than partisan politics or even religious beliefs: How much of a role should religion play in public life?

The Divide

The country is split between two camps. On one side are those who, like Newdow, think that government should be secular, and that the laws should make it so. On the other are those who believe that common values derived from religion should inform our public decisions just as they inform our private lives. An extreme example is former Alabama judge Roy Moore, who put up a 2½-ton granite monument to the Ten Commandments in the state Supreme Court building and refused to take it down, even when the federal courts ordered him to.

The two sides fight it out on a very basic level in debates about when life begins the issue in the abortion and stem cell research debates. And when it ends—the issue that engulfed the nation in the Terri Schiavo case. Tell me whether you think religion should play a role in government decisions, and I'll tell you where you come out on these core debates.

Even the ever-controversial debate over same-sex marriage is really about religion and government. Opponents of same-sex marriage say that marriage has a traditional religious meaning as the union of one man and one woman. They don't want the government to change that. Supporters say that the religious definition of marriage has no bearing on the purely legal question of whether everyone should have equal access to a benefit given by the government.

These hard questions, which reach the U.S. Supreme Court so often, are lightning rods for debate because they go to the very heart of who we are as a nation.

Is There an Answer?

Actually, the Framers had a pretty good one, not that either side is reading their intent right. Both like to claim that the Constitution is on their side and want to enlist the Founding Fathers for their preferred position.

The Newdow-leaners, or "legal secularists," point out that God is conspicuously absent from the Constitution, and that the First Amendment prohibits an establishment of religion even as it guarantees "the free exercise thereof." They conclude that religion and government must be separated by a high protective wall. The Moore sympathizers, or "values evangelicals," counter that the words "separation of church and state" also do not appear in our founding document. Reminding us that the Founders' America was almost entirely Christian—and 95% Protestant—they conclude that Judeo-Christian values are the true basis for our national project.

So, Who's Right?

Both sides are only half right. The Framers believed to a man in the importance of the liberty of conscience, and they barred a national established religion in order to protect that value. Obsessed with taxes, they thought that an official religion would infringe on religious liberty by spending tax dollars for religious purposes. They also knew they could never agree on a national religion, given their own diverse denominations. But so long as no money was involved and the government was not coercing anyone in religious affairs, they had no great objection to religious symbols in the public sphere. Thomas Jefferson excepted, all the early presidents declared public days of Thanksgiving and prayer-even James Madison, author of the First Amendment.

If we were serious about getting back to the Framers' way of doing things, we would adopt their two principles: no money and no coercion. This compromise would allow plenty of public religious symbolism, but it would also put an end to vouchers for religious schools. God could stay in the Pledge, but the faith-based initiative would be over, and state funds could reach religious charities only if they were separately incorporated to provide secular social services.

The public could logically embrace this modest proposal, and the zealots on both sides should think it over. Secularists want all Americans to feel included as citizens, but right now, many evangelicals feel excluded by the limits on their religious expression. Meanwhile, values evangelicals should recognize that state funding of religion means their own tax dollars are going to support radical religious teachings that they abhor.

Our nation today is more religiously diverse than ever. No longer Judeo-Christian (if we ever were), we are now Judeo-Christian-Muslim-Buddhist-Hindu-agnostic-atheist. That means we need a new church-state solution to reconcile our religious differences with our common faith in America. The Framers' own views can lead the way—and we should follow.

Feldman, author of Divided By God: America's Church-State Problem—and What We Should Do About It, is a professor at the New York University School of Law and a fellow of the New America Foundation.

Bench Unfair Judge-Picking Process Now

BY JAMES E. JOHNSON AND CRISTINA RODRÍGUEZ *This op-ed appeared in the* New York Daily News *on May 3, 2006*.

W York's system of selecting trial court judges rewards influence, insiders and cronyism. Predictably, that system fails to produce a bench with racial and gender diversity, which are the prerequisites for fair decision-making and equal opportunity.

New York is one of 33 states that elects its general jurisdiction trial court judges in contestable elections. Every single one of the other 32 states allows candidates to compete for their party's nomination (or a place on a nonpartisan election ballot) by filing notice, paying a small fee or gathering signatures directly among party voters. Not so in New York. Although the New York Constitution guarantees that "the justices... shall be chosen by the electors [i.e., the voters] of the judicial district in which they are to serve," justices are selected through a de facto appointment system controlled by political party insiders.

What happens when a good old boys network controls who ultimately serves on the state's highest trial courts? Consider the ordeal of Surrogate's Court Judge Margarita López Torres, the plaintiff who successfully challenged New York's judicial selection system.

The Puerto Rico-born López Torres refused to do the party leaders' bidding, and therefore was repeatedly thwarted in her efforts to earn the Democratic nomination to the office of Supreme Court justice. In January, a federal court struck down the judicial selection system, ruling that it violated the rights of New York's voters and candidates like Judge López Torres.

According to the court, Judge López Torres "demonstrated...that indisputable qualifications for the job and immense popularity among the candidate's fellow party members are neither necessary nor sufficient to get the party's nomination. Something different is required: the imprimatur of the party leadership."

A closed, de facto appointment system means that the composition of the bench will fail to reflect the racial diversity of our state. Back in 1992, the New York State Task Force on Judicial Diversity warned that a "major cause of lack of diversity on the judiciary is the closed nature of the system now used in New York to elect [Supreme Court] judges." Fourteen years later, the system for selecting trial court judges is still closed. And in five of New York State's 12 judicial districts, there is not a single minority Supreme Court justice.

In Manhattan, 44% of sitting justices are minorities. But Manhattan's record is the exception, not the rule: Persons of color serving as Supreme Court justices in this one county make up 92% of the statewide total of minority justices.

And the closed system has failed to bring about gender diversity. In 2002, the New York State Committee on Women in the Courts cited statistics showing that the Supreme Court had a lower percentage of women on the bench than any other court in New York State, except for the upstate county courts: 17% statewide.

Continued support for New York's unconstitutional status quo runs counter to the goals of democracy. The time has come to create a judicial selection system that places judicial qualifications ahead of political patronage and opens the door to racial and gender diversity.

Johnson is the chairman of the board of directors of the Brennan Center for Justice at NYU School of Law. Rodríguez is an assistant professor at NYU School of Law and serves on the Brennan Center's board of directors.



NEW FACULTY

Additions to the Roster

The Law School is pleased to welcome seven eminent new professors to its full-time faculty and to introduce a distinguished group of 38 visiting faculty and fellows to our community. These impressive scholars come from as near as uptown Manhattan and as far away as Seoul. Their work is as diverse as their geography; they specialize in everything from torts to taxes.

Cynthia Estlund

Catherine A. Rein Professor of Law

A s a visiting professor last spring, Cynthia Estlund did something that her colleagues have only fantasized about: She banned laptops in the classroom. "She came in as a complete outsider and tried something new that was likely to completely bug the students. And they went with it," says Deborah Malamud, AnBryce Professor of Law.

Challenging the status quo is typical for Estlund, who will join NYU as a professor this fall. In her scholarship "she raises serious questions as to whether the current labor law system will continue to work in this country," says Malamud. And her creative thinking has earned her the respect of her peers. "Professor Estlund has done important work exploring the limits of labor law doctrine and integrating First Amendment theory into the law and politics of the workplace," says Professor Samuel Estreicher, the director of the Center for Labor and Employment Law.

Since entering law school, Estlund's professional and intellectual interests have centered on labor and employment law. "I liked the idea of representing people who had their own goals and some power to pursue them, but who needed legal help," she says. But recent decades have not been kind to unions or to labor law. In her last traditional labor law piece, "The Ossification of American Labor Law" (Columbia Law *Review* 2002), Estlund discusses the multiple barriers to renewing and reforming the labor laws. "It's a bit of a eulogy," she says of the paper. "It's about the many ways in which law reform could happen and does happen in other legal regimes, but doesn't happen in labor law." In 2003, she published the book

Working Together: How Workplace Bonds Strengthen a Diverse Democracy (Oxford University Press). In it, she argues that the workplace has become the most important site of cooperation, sociability and communication among people of diverse backgrounds. She also hopes to expand her recent article "Rebuilding the Law of the Workplace in an Era of Self-Regulation" (Columbia Law Review 2005) into a book.

Estlund, 49, was born in a small town in Wisconsin. Her late father, Bruce, sang in big bands, then became a newspaper man until the financial pressures of raising three children nudged him into public relations. Her mother, Ann, 71, was a freelance writer. Estlund attended Lawrence University in Appleton, Wisconsin. During college she held jobs in the school's cafeteria, as a research assistant in an insurance company, as a restaurant hostess and even as an apple-picker. Upon graduating in 1978 with a summa cum laude degree in government, she landed a fellowship to study government programs for working parents in Sweden. She lived for two years in an urban commune, became fluent in Swedish. worked in the antinuclear-power movement and studied sociology. "I was impressed by the role that organized labor had played in building a humane society in Sweden and across much of Europe," she says.

Returning to the United States, she entered Yale Law School, where she met her husband, Samuel Issacharoff, now 52, a constitutional law expert at NYU. Earning her J.D. in 1983, she clerked for Judge Patricia M. Wald of the D.C. Circuit. While clerking, "we realized that we'd become altogether too boring," Estlund says. So she and Issacharoff took off for a six-month stint in Argentina, becoming involved in the newly democratic government's efforts to prosecute the military for human rights abuses. Still not ready to get completely back "on-track" they joined small law firms in Philadelphia before moving to Washington, D.C., where Estlund worked at the high-powered unionside labor law firm Bredhoff & Kaiser.

Balancing competing urges to stay with the pack or go her own way is one of the things that Estlund does best, according to her husband. She also can maintain "a cleareyed view of the law as a system of governance, power and order," while not losing sight of what's right and wrong, he says.

In 1989, they jointly made the leap into academia, landing at the University of Texas School of Law. There Estlund taught property and labor and employment law and became an associate dean for academic affairs. In 1998, Estlund and Issacharoff took offers to visit and then stay at Columbia Law School. Estlund taught and served as vice dean for research.

The move to NYU offers her an academic environment that she calls "a better fit," and a fresh start as she and Issacharoff face their first year as empty-nesters. Their children, Jessica, 19, and Lucas, 18, will both be at college. Says Estlund: "We've been fortunate to find a 'track' that allows us to follow our own intellectual fancy, to lay our own tracks, you might say."



Roderick M. Hills Jr. William T. Comfort, III

Professor of Law

ick Hills, 42, may very well be the only professor who has had to find a home for his farm animals (goats, a sheep, a pony, chickens and his horse, Reflector) before taking a job at the Law School. Should New Yorkers find that odd, the quick-witted Hills, an expert in federalism and constitutional law, quips: "Thank God we here in Michigan are not governed by a bunch of blue-state New Yorkers who don't understand the importance of livestock." Seizing an opportunity to teach by example, he adds: "That's what I mean by federalism. The cultural divergence between different regions makes it disastrous to attempt to impose a single system of legislation on the nation."

Hills, who taught for 12 years at the University of Michigan Law School, joins NYU in September to teach Land Use Regulation and The Administrative and Regulatory State. The son of prominent D.C. Republicans-his father, Roderick M. Hills Sr., was the former chairman of the U.S. Securities and Exchange Commission (1975-77) and counsel to President Gerald Ford; his mother, Carla Hills, was secretary of the Department of Housing and Urban Development during the Ford administration and U.S. Trade Representative under George H.W. Bush's administration-Hills eschewed politics, making a name for himself in constitutional law. His research focuses on the costs and benefits of decentralizing public power. "His learning and practical knowledge range across every level of government, from local governments to state governments to the national government," says Richard Pildes, the Sudler Family Professor of Constitutional Law. "I know of no one else who contributes on the great constitutional issues of our time and who also attends local zoning hearings, just out of intellectual curiosity and a desire to understand the practical workings of government."

Hills's recent work hints at his range. In his forthcoming essay, "Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism," he tackles the issue of government subsidies for industry. In another upcoming book chapter called "Sex, Drugs, God and Federalism," Hills examines the outcome of the 1648 Peace of Westphalia to determine the role that federalism played in defusing conflicts over religion and culture. Professor Don Herzog of the University of Michigan Law School hails the piece as Hills's "best work yet," predicting that "this will be a gigantic piece of scholarship."



The second of four children, Hills spent his earliest years in Los Angeles before moving to Washington, D.C., when he was 10. As a teen, Hills played with the Peabody Youth Chamber Orchestra. "I was a super cello nerd in high school," says Hills, who began his undergraduate studies at Yale University majoring in music. He eventually switched to history, with an emphasis on British intellectual history and German idealist philosophy, earning his B.A. in 1987. After graduation, he enrolled in the Committee on Social Thought, an interdisciplinary program in the humanities at the University of Chicago. He'd intended to go for his Ph.D., but quit to follow his then-fiancée, Maria Montoya, to Yale. While she studied history, he entered Yale Law School, reluctantly at first. "I had no interest in being a lawyer at the time," he says. There were too many lawyers already in his family. His parents had founded the California law firm of Munger, Tolles & Hills in 1962, and two of his three sisters were lawyers. But, "once I got to law school, I loved it."

After earning his J.D. in 1991, he clerked in Dallas, Texas, for Judge Patrick

Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. After the clerkship, Montoya landed a job teaching history at the University of Colorado, and Hills followed his wife again-teaching at the law school and practicing at the Law Office of Jean Dubofsky, where the lawyers worked primarily on appellate briefs. There he second-chaired, and won, the famous gay civil rights litigation Romer v. Evans. He went on to teach at Michigan in 1994, where Montoya also became a professor. "It was a challenge for both of us to be working towards tenure while raising our two daughters," Hills says. "But it helped that our work overlapped so much: Maria's book was on 19th century struggles for land in the American West, so she was writing on local political corruption and property law-two of my favorite topics. We read each other's drafts and learned from each other's research."

"Having spent 12 years in a medium-size college town," says Hills, "we're ready to live in, and expose our daughters to, the new environment of a major city." He is no doubt also looking forward to having a new city and state government to examine through the lens of federalism. Montoya, 42, will teach history at NYU. Their children, Emma, 14, and Sarah, 12, presumably will have fewer chores since they will no longer have to feed and care for Reflector and the gang.

Florencia Marotta-Wurgler Assistant Professor of Law

Professor Florencia Marotta-Wurgler 'on was online buying a used copy of a biography of Russian intellectual Lou Andreas-Salome, when an idea for a research paper struck her. "I said, 'Wait a second. I just gave my credit card to a stranger who lives in Sweden. How do I know that I'm going to get the book?' What if the seller disappears in the middle of the night? Do buyers protect themselves?" recalls Marotta-Wurgler, who will teach Contracts and e-commerce beginning this fall. "And what about those econtracts that the buyer is required to click on, but rarely reads?"

Marotta-Wurgler, 32, set out to determine whether online sellers who don't disclose their contracts before the transaction offer worse terms than those who do. She collected and read over 515 software license agreements for products sold online. About half of the contracts in her sample were made available to the buyer on the seller's Web site. The other half went against the basic principles of contract law, in that the buyer was not able to read the terms



until after he or she purchased the product. The result of her examination, described in her yet unpublished paper "Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence From Software License Agreements," stunned her colleagues. The hidden or "pay now, terms later" contracts offered relatively more buyer-friendly terms than those that consumers were forced to accept in advance. "While many professors have written about electronic contract formation at a theoretical level and speculated about its consequences, she's really the first person who's tried to discover what's actually going on in this area," says Law School Vice Dean Clayton Gillette.

In a companion paper, "Competition and the Quality of Standard Contracts: An Empirical Analysis of Software Agreements," Marotta-Wurgler, an e-contracts expert who paradoxically wrote in longhand until law school, looked at whether online sellers with a dominant market share take advantage of their position by imposing worse terms on the buyer. There, too, she found that monopolists did not offer unusually harsh terms, though they did charge more. She is currently working on a paper tentatively titled "Is There an 'Informed Minority' of Standard Form Contract Shoppers? Evidence from Online Shopping Behavior" to examine buyer behavior online.

Born Maria Florencia Isabel Marotta, she and her two younger brothers were raised in Buenos Aires by parents who, she says, couldn't be more different from one another. Her mom, Silvana, 56, is an artist; her dad, Horacio, 58, is an engineer who spurred her intellectual curiousity. "When I was seven, he'd come home at night and read me the theory of relativity."

When it came time for Marotta-Wurgler to go to university, she didn't feel comfortable with the European system, in which students declare their career path from the get-go. "I was interested in a lot of things," she says, with a slight Argentinian accent, so she pursued a liberal arts education in the United States at the University of Pennsylvania, graduating in 1996 with a major in economics. Marotta-Wurgler traces her fascination with economics back to her Argentinian upbringing, during which the peso was constantly devalued against the dollar. "One day the price of the bus went up so high that I couldn't afford the ticket in the afternoon and had to walk home," she recalls with a laugh.

Eager to learn how to conduct original empirical economic research, she became a research analyst in 1996 at the National Bureau of Economic Research, an economics think tank in Cambridge, Massachussetts. For two years, she worked on projects on medical costs and aging. "I liked doing economic analysis," she says, "but thought there's this other angle that I want to explore that is more typically done by legal analysts." That's when she moved to New York to attend NYU. She excelled at the Law School, quickly finding her niche in contracts law. After graduation, Marotta-Wurgler became an associate at Davis Polk & Wardwell. She left after a year and a half to teach. "Some people love the adrenaline rush of meeting clients and doing deals. I'm more reflective. That's the way I'm wired."

In June 2003, she got a Fordham fellowship to teach Corporations at Fordham Law School and help run the Center for Corporate, Securities and Financial Law. Marotta-Wurgler left Fordham in June 2004, when her alma mater offered her the Leonard Wagner Fellowship in Law and Business.

Things fell into place in her personal life that year, too, when she met Jeffrey Wurgler. In an odd twist, he had worked in the office next to hers during her years at the National Bureau of Economic Research, but they had never crossed paths. She and Jeffrey, 33, who teaches behavioral finance at NYU's Stern School of Business, married in 2004 and are raising Lucy, their Norfolk terrier puppy.

Smita Narula Assistant Professor of Clinical Law

Y ou won't find Coca-Cola in Professor Smita Narula's refrigerator—Narula, 33, a faculty director of the Center for Human Rights and Global Justice (CHRGJ), won't buy it because the bottling process in her native India usurps the natural water supply. Nor will you see a diamond engagement ring on her finger—her husband, Richard Green, 36, "had to find something that doesn't involve child labor abuses (like the production of diamonds), armed conflict or other human rights violations," she says, with self-deprecating humor.

Narula simply stands by her beliefs, wherever they lead her. Though her family is considered upper caste—"It goes against me to even identify which caste; I don't believe in them," she says—Narula has made the cause of discrimination against the so-called lowest caste, the Dalits, her own. India officially abolished the practice of untouchability in its 1950 constitution, but the Dalits are still segregated from the upper castes, still live in extreme poverty and are forbidden to intermarry, hold



property or even drink from the same well as those of higher castes. In 1999, Narula spent months in India for Human Rights Watch (HRW) interviewing Dalits about their plight. The result: her award-winning book, *Broken People: Caste Violence Against India's Untouchables*. For her work, as well as her role in bringing together human rights activists in India to form the National Campaign for Dalit Human Rights, a former chief justice of the Supreme Court of India awarded her the Human Rights Award for Outstanding Research and Writing.

Because of Narula's exposé and the work of the campaign, the Dalits were put on the agenda at the 2001 World Conference Against Racism, held in South Africa, says Sam Zarifi, research director of the Asia Division at HRW. "What sets her apart," he says, "is that she combines the passion of an activist with the dispassionate analysis of a top academic lawyer."

Take the case of the estimated 2,000 Muslims massacred in a bloody three-day slaughter in the state of Gujarat, India, in 2002. Government officials portrayed the incident as a spontaneous riot that occurred in retaliation for an earlier attack on Hindus that was blamed on Muslims. Narula traveled to India for HRW to interview hundreds of survivors and police. Her report, "We Have No Orders to Save You," concluded that the Indian government actually engineered the killings, having Muslims cut and set on fire with kerosene lamps. Her report made waves in the international community. In 2005, the United States barred Narendra Modi, the Gujarat chief minister, from visiting.

Narula was born in Delhi to Sudershan, now 65, the director of medical services for the United Nations, and Hans, now 70. who worked for UNICEF and is retired. Subject to their parents' frequent transfers, Narula and her brother spent their earliest years in Delhi, Jakarta and Kabul. When Narula was nine, the family moved to New York City, where she attended the U.N. International School. She earned a combined bachelor's and master's degree at Brown University in international relations and international development, graduating magna cum laude at the age of 20. She went on to get her law degree at Harvard, where she was the editor of the Harvard Human Rights Journal, and became interested in caste discrimination. After law school, she joined HRW. "I feel my relative privilege very strongly," she said. "Any measure of privilege brings with it responsibility."

Narula came to NYU in 2003 to become the executive director of CHRGJ

and to coteach the International Human Rights Clinic. This year, she was made an assistant professor of clinical law and a faculty director of the CHRGJ. Professor Philip Alston, the chair and faculty director of the CHRGJ, says of Narula: "There are few people who are as well connected and able to put students in contact with that network."

In 2005, Narula and her clinic students published "The Missing Piece of the Puzzle," examining the role that caste discrimination plays in the current conflict in Nepal. Many of the recommendations in the report have been raised in parliamentary meetings of the European Union and been incorporated into the mandate of the U.N. in Nepal. Along with Jayne Huckerby, CHRGJ's research director, Narula and her students are now concentrating on a report critiquing the use of racial profiling and lethal force in the shoot-to-kill policies that various governments have enacted or authorized in the wake of 9/11.

Narula's scholarship similiarly takes on timely social issues. In a recent article in the *Columbia Journal of Transnational Law*, Narula asks whether corporations and international financial institutions can be held accountable for violations of the right to food and other social and economic rights under international law.

Such focus and intensity is typical of Narula, says her husband of three months; they were married at the U.N. Chapel last June. "She approaches her students, her writing, her activism all the same way," he says. "Fully engaged."

Margaret Satterthwaite Assistant Professor of

Clinical Law

o watch Margaret Satterthwaite field emails in her office, dressed conservatively in a crisp white button-down shirt and navy pantsuit—funky blue/brown plastic glasses not withstanding—one would never suspect that she once was a rebellious teen punker. Then again, nothing about this assistant professor of clinical law, who also holds a master's degree in literature and once combed the streets of Haiti investigating human rights abuses, is predictable.

"An unconventional career path? Is it?" Satterthwaite '99 asks about herself. "I certainly didn't want to be a lawyer initially," she concedes. "I wanted to be an activist."

These days, as a faculty director of the Center for Human Rights and Global Justice (CHRGJ), Satterthwaite, 37, is a



little bit of both. "She is among a handful of scholars in the United States who have managed to combine very thorough and nuanced scholarship with timely and pathbreaking analyses of the most pressing issues confronting practitioners in this area," says Professor Philip Alston, who heads up the CHRGJ.

In the three years since returning to her alma mater to teach, she has generated several important human rights reports and articles. In 2004, Satterthwaite and CHRGJ researchers, in conjunction with a committee of the Association of the Bar of the City of New York, released a hefty legal report called "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions.'" The report concluded that "extraordinary rendition"-sending suspected terrorists to countries where they risk being tortured under interrogation-is not authorized by any publicly available statute, regulation or executive finding and violates international law binding on the U.S. Satterthwaite is expanding that research into a scholarly piece, "Extraordinary Rendition: Testing the Limits of Human Rights Law," which is expected to be published this winter in the George Washington Univer*sity Law Review.* In "Fate and Whereabouts Unknown: Detainees in the 'War on Terror'" (*CHRGJ* Dec. 2005), Satterthwaite looked at a related issue: the enforced disappearances of terrorist suspects detainees who are held in secret locations by the U.S.—many of whom were allegedly involved in the 9/11 attacks.

Satterthwaite was raised in Maryland and Virginia by her divorced mom, Sara, 63, who worked in a series of "pink-collar jobs," such as dental hygienist. As a teenager, she says, "I was politically aware and felt like high school was this world of trying to look good and going to proms." She fell into a group of activists and jumped at the opportunity to enter the New School's Eugene Lang College a year early. She took to New York City, and soon became involved in Amnesty International (AI).

Satterthwaite earned her B.A. in 1990, majoring in literature and gender studies, then headed to California, where she worked as an editorial assistant in a publishing company before entering a Ph.D. program in literature at the University of California at Santa Cruz. Her intention was to become a college professor, but she left after earning her M.A. to follow her activist passion: "I realized that the thing that really excited me was human rights work." Moving to Washington, D.C., in 1994, she directed AI's campaign on gay and lesbian rights before joining a human rights organization called Street Law. She also had the opportunity to travel to Haiti, where she was an investigator for the Haitian National Truth and Justice Commission; she learned Kreyol and investigated the human rights abuses that occurred during president Jean-Bertrand Aristide's exile from 1991 to 1994. The work she did in Haiti, with a team led by an impressive, Haitian lawyer, made her realize the importance of a law degree.

She was accepted into NYU on a Root-Tilden-Kern scholarship, and did two summer internships-one representing Haitian asylum-seekers and the other working for a human rights organization in Portau-Prince. After law school, Satterthwaite completed two clerkships-one with Judge Betty B. Fletcher of the Ninth Circuit, and a second at the International Court of Justice in The Hague. Between clerkships she was a Furman Fellow at Human Rights First. In 2002, she worked for the U.N. Development Fund for Women, becoming interested in the plight of women migrant workers-a focus that has been the subject of her current and previous scholarship, including "Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers" (Yale Human Rights and Development Law Journal 2005).

She returned to teach at the Law School in the fall of 2003, and in January 2006 became a faculty director at the CHRGJ and an assistant professor of clinical law. She also settled down, marrying her partner, Alison Nathan, a visiting assistant professor at Fordham Law School, last spring. "I thought I'd have a couple more years working in human rights," she says of the latest turn in her career path, "but this was my dream job. It allows me to combine advocacy with scholarship and teaching."

Robert Sitkoff Professor of Law

t's clear from the outset of any of Professor Robert Sitkoff's classes that he has an unbridled passion for trusts and estates (T&E). And by the end of the semester many of his students do, too. The energetic 32-yearold belts out songs about the class material, impersonates other law professors and has created his own superhero, Fiduciary Man.

"I get really worked up and excited in class. I just get lost in the moment. Whatever it takes to engage the students in the material," says Sitkoff, who begins at the Law School in the fall. Sitkoff's enthusiasm earned him the Dean's Teaching Award in 2002 at Northwestern University School of Law, as well as the student-voted title of Outstanding Teacher of a First-Year Course (2001). One student evaluation said: "This was my best class since gym."

While T&E is traditionally taught from a historical perspective, Sitkoff's approach has an economic and empirical bent, mirroring his scholarly orientations. In one of his most influential papers, "An Agency Costs Theory of Trust Law" (Cornell Law Review 2004), Sitkoff draws on the agency cost literature of corporate law to develop an economic theory of trust law. Since that article, agency cost analysis has become routine in the literature of trust law. With coauthor Max Schanzenbach, Sitkoff published "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes" (Yale Law Journal 2005)-the first empirical assessment of the effect of abolishing the rule against perpetuities. This study, which was featured in news media such as the Wall Street Journal, found that from the mid-1990s through 2003, roughly \$100 billion in trust assets poured into the states that abolished the rule. Their latest study, "Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?" is forthcoming in the Journal of Law and Economics. These studies, along with several new ones now in progress, will form the core of a book, Sitkoff's second, to be published by Yale



University Press. In 2005, Sitkoff coauthored *Wills, Trusts, and Estates* (Aspen 7th ed.), the leading casebook in the field. Sitkoff has also been appointed as the reporter, or principal drafter, for the Uniform Law Commission's effort to create a uniform statutory business trust act. "These various initiatives will shape the field of T&E for decades to come," says John Langbein, Sterling Professor of Law at Yale Law School and one of the most revered scholars in the field. "What Sitkoff is doing is exploring the trust as a mode of economic organization rather than in its dimension as a gratuitous transfer."

Sitkoff is the eldest of two sons raised on Long Island by his mother, Deborah, a former school social worker, who died while Sitkoff was a teenager, and his father, Samuel, 64, a retired T&E lawyer. "My father was my first trusts and estates professor," he says. "Apparently, when I was a toddler, I'd pick up my toy phone and say: 'Hello client," Sitkoff recalls. A few years later he was typing wills for his dad.

In 1996, after earning a B.A. with honors from the University of Virginia, he attended the University of Chicago Law School. From the get-go, "I was captivated by legal doctrine," he says. "Then when I took a trusts and estates class, it became absolutely clear that this was the area for me." And the territory within T&E that he wanted to explore was pretty much uncharted: "That was doubly exciting." Graduating from law school in 1999, he landed a clerkship with Chief Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit. Posner validated Sitkoff's research agenda by encouraging his interest in T&E, "so all the pieces came together."

In September 2000, just three days after his 26th birthday, Sitkoff became an assistant professor of law at Northwestern University, the youngest on the faculty. "The only decision that was easier" than going into legal academia, he says, "was marrying Tamara."

He was at a friend's barbecue one summer during law school when he met Tamara, 33, who worked in the Chicago public school system. In May 2001, they went on their first date. Three weeks later it was obvious to both that they would marry. They tied the knot in March 2003 (their rabbi and Judge Posner both officiated), and last winter their first child, Deborah Eve, was born. Says Sitkoff of the dramatic changes in his life: "These are wonderful, exciting, happy times."

Jeremy Waldron

University Professor

or a scholar who's been described as a dynamo, a live wire, an enormously energetic intellect, Professor Jeremy Waldron had a quite uneventful upbringing. He was raised in New Zealand's Invercargill, a small city in a farming district—"the southernmost city in the British Empire!"—where his father, an Anglican clergyman, served in the same parish for Waldron's entire childhood. Indeed, Waldron didn't leave New Zealand until he was 25.

But since then, Waldron, 52, often considered one of the world's leading contemporary political philosophers, has rocketed through the academic world—to Oxford, to Edinburgh, to Berkeley, to Princeton, to Columbia, and now this fall, to NYU. "In the area of legal philosophy," he says, "NYU has a hugely successful, vigorous intellectual community. In legal theory, it has people like Ronald Dworkin, Tom Nagel, Liam Murphy, Lewis Kornhauser, David Richards, Sam Issacharoff, David Garland, Philip Alston and my countryman Ben Kingsbury. It's a very rich community."

Waldron has visited the Law School before, presenting papers at the Colloquium in Legal, Political and Social Philosophy, run by Dworkin and Nagel. Indeed, his relationship with Dworkin dates back to Oxford, where Dworkin had been his academic adviser. But though they've remained close through the years, Waldron hasn't always followed in his mentor's footsteps. He wasn't tempted by the world's leading legal philosophy chairs that had been Dworkin's the Chair of Jurisprudence at Oxford and the Quain Professor of Jurisprudence at University College London. "He turned down two of my chairs, so I'm lucky he's coming to NYU," jokes Dworkin.

So, does Waldron's much-heralded appointment mean he is finally set to inherit the unofficial mantle of the world's top legal philosopher from Dworkin? Not according to Waldron. "I think that's nonsense," he says. "First of all, Dworkin shows no signs of giving away the mantle. And things don't work like that. Everyone works in his own areas. People may use that phrase but it would be wrong." Professor Liam Murphy agrees: "He doesn't need to inherit Dworkin's mantle. He's famous in his own right."

A lively, animated teacher, Waldron is a highly prolific writer of books and academic papers. "He's not just writing more than some of us, he's writing more than most of us!" Murphy says, laughing. Waldron, who made his mark at 35 in the area of property rights with the book *The Right to Private Property*, isn't reticent about policy issues, either, taking strong, sometimes controversial stands on judicial review (should be weakened); torture as a way of eliciting information (should be banned absolutely); and multiculturalism (wrong and silly). His studies take him to the very center and conver-



gence of political philosophy, legal philosophy and political theory. "I'm as comfortable teaching historical political theory—Locke, Hobbes, Aristotle—as I am teaching modern constitutional jurisprudence or as I am abstract political philosophy," he says.

Even as a teenager, Waldron had an interest in law and history. He earned degrees in philosophy and law from New Zealand's University of Otago, and went to Oxford in 1978 to do graduate work. He first read about Dworkin in a 1977 Time magazine profile drawn to his attention by his mentor and "philosophical godmother," Professor Gwen Taylor of the University of Otago in New Zealand. She had written to H.L.A. Hart for advice on whom Waldron should study with at Oxford. Hart wasn't taking new students but suggested Dworkin, and the relationship began. "He was very glamorous, quite intimidating intellectually, but a good person to work with," Waldron recalls. Dworkin would, typically, shred Waldron's paperscourteously, of course-and Waldron says he now owes a great debt to Dworkin for his rigorous workings-over. Dworkin, in turn, remembers Waldron then as "engaging, informal, funny, very fast and quick."

From 1980 to 1982, Waldron was a fellow at Lincoln College, Oxford. Anxious to get on a tenure track, he decided to quit Oxford and go to the University of Edinburgh in Scotland. He stayed there until 1987, when he left for the Boalt Hall School of Law. Nearly 10 years later, he and his companion, Carol Sanger, then a law professor at Santa Clara Law School, were recruited separately by Columbia Law School. "I didn't like New York so much, so I succumbed to an offer from Princeton and Carol accepted Columbia." But he wasn't happy at Princeton, and after just one year he moved to Columbia. He stayed for "a glorious nine years"-just last year he was named University Professor.

Waldron has several projects in the works, including collecting historical writings on the rule of law. That will be the topic for a course he will teach in the spring. This fall, he'll help conduct the demanding Colloquium in Legal, Political and Social Philosophy with Nagel and Dworkin.

One thing Waldron will be doing less of this year is administrative work. He ran a center on law and philosophy at Columbia and chaired the University Senate Committee on Libraries and IT there. He says that he won't miss the grinding committee work and that he's happy that he will be able to partake of the classical music, opera and travel that he loves. But also, he says, his new schedule will give him more time to focus—"on the core activity of teaching and writing."

Visiting Faculty

Omri Ben-Shahar

Omri Ben-Shahar is the Kirkland and Ellis Professor of Law and Economics at the University of Michigan Law School and

the founder and director of the Olin Center for Law and Economics. In Fall 2006, Ben-Shahar will visit NYU to teach contract law. He will also pursue his research interests, which include precontractual lia-



Omri Ben-Shahar

bility, products liability in pharmaceuticals and the legal limits of bargaining power.

Ben-Shahar's work in contract law has been published in the American Law and Economics Review, the Journal of Law, Economics and Organization, the Journal of Legal Studies, the University of Chicago Law Review and the Yale Law Journal, among other publications. He is currently working on a book, Contracts without Consent, and his article of the same name was the subject of a recent symposium published by the University of Pennsylvania Law Review.

Before joining the faculty at Michigan, Ben-Shahar taught law and economics at Tel Aviv University, was a research fellow at the Israel Democracy Institute, served as a panel member of Israel's Antitrust Court and clerked for the Supreme Court of Israel.

Neil Buchanan

"I had always felt like a round interdisciplinary peg in a square economics hole, and I saw that the interests and methods of legal scholars were very well suited to my own scholarly



approach," says Neil Buchanan, a long-time economics professor who became a lawyer in 2002 and has taught at the Rutgers School of Law-Newark since 2003. As a visitor to the Law School in the 2006o7 academic year, he will teach two classes-

Neil Buchanan

Contracts for International LL.M. Students and Income Taxation-and two seminars, "Distributive Justice and the Law" and "What Do We Owe Future Generations?"

After earning an A.B. in economics from Vassar College, Buchanan received an A.M. and a Ph.D. in economics from Harvard University, where he was a National Science Foundation Graduate Fellow. Buchanan

has taught economics full time at Goucher College, Wellesley College, the University of Michigan and the University of Wisconsin-Milwaukee, and as a visitor or adjunct at Bard College, Towson State University, the University of California, Berkeley and the University of Utah. From 1997 to 1999, he was the director of the Center for Advanced Macroeconomic Policy at the University of Wisconsin-Milwaukee.

After graduating from the University of Michigan Law School, he clerked for Judge Robert H. Henry of the U.S. Court of Appeals for the Tenth Circuit. Buchanan has published articles in the Journal of Economic Issues, the Tax Law Review, Tax Notes and the Virginia Tax Review. He was previously in residence at NYU in Spring 2006.

Bruce Green

An expert in the areas of legal ethics, criminal law and criminal procedure, Bruce Green is the Louis Stein Professor of Law at the Fordham University School of Law, and the director of its Louis Stein Center for Law and Ethics. Green will teach a course in professional responsibility and a seminar on ethics in criminal advocacy in Spring 2007.

After earning his A.B. in English from Princeton University and his J.D. from Columbia Law School, Green clerked for

Judge James L. Oakes of the United States Court of Appeals for the Second Circuit and for **U.S. Supreme Court** Justice Thurgood Marshall. For four years he worked as an assistant U.S. attorney for the



Southern District of New York. While teaching at Fordham, Green has served as a consultant and special investigator for the New York State Commission on Government Integrity, as associate counsel to the Iran/ Contra prosecutor and as a member of the New York City Conflicts of Interest Board.

Green has published more than 50 articles in such publications as the Columbia Law Review, the George Washington Law Review, the Georgetown Law Journal and the Vanderbilt Law Review.

Michael Harper

A professor of law and Barreca Labor Relations Scholar at Boston University School of Law, Michael Harper teaches labor law, employment law, employment discrimination law, administrative law, sports law and entertainment law. In Fall 2006, he will visit NYU to teach a seminar

on law and sports and write about collective bargaining in sports and entertainment.

Among Harper's publications are the books Employment Discrimination and Employment Law, Employment Discrimination Law, and Employment Law (all West Publishing, 2004), all cowritten with NYU School of Law Professor Samuel Estreicher. He has contributed articles to the Boston College Law Review, the George Washing-

ton Law Review, the Michigan Law Review, the San Diego Law Review, the University of Pennsylvania Law Review, the Virginia Law Review, the William and Mary Law Review and the Yale Law Journal.



Michael Harper

Harper received his A.B. in economics from Harvard University and his J.D. from Harvard Law School, both magna cum laude. He clerked for Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit before working as a staff attorney and director of the student internship program at the Center for Law and Social Policy in Washington, D.C.

A Yankees fan, Harper plans to take advantage of his time at NYU to attend a few games. How has he managed to live so long in Boston as a partisan of a New York team? Says Harper: "I am a natural dissident I would not have survived long in a totalitarian society, but I am thick-skinned enough to survive in Boston."

Robert A. Kagan

Robert A. Kagan, a professor of political science and the Emanuel S. Heller Professor of Law at the University of California, Berkeley, will teach a class, The Administrative and Regulatory State, and a graduate seminar, The Social-Scientific Study of Legal Institutions, while visiting in Fall 2006. He also plans to work on a collaborative empirical study, funded by the Environmental Protection Agency, of emissions control for diesel vehicles.

Kagan, who earned an A.B. from Harvard University, a J.D. from Columbia Law School and a Ph.D. in sociology from Yale University, is a former director of Berkeley's Center for the Study of Law and Society. A fellow of the American Academy of Arts and Sciences, Kagan has written or cowritten five books, including Adversarial Legalism and American Government: The American Way of Law (Harvard University Press, 2001). He has coedited seven other books, edited or coedited two journal symposia and published

articles in such journals as the *Law & Society Review*, the *Michigan Law Review* and the *Stanford Law Review*.

At Berkeley, Kagan has taught numerous courses, including Responses to Injustice: Legal Claims and Regulation; Environmental Politics, Policy and Law; and Law, Society

and Politics. Kagan, who began his career as a private practitioner, served as assistant to the chairman of the Federal Price Commission in Washington, D.C., in 1971. More recently, he has been a visitor at



Robert A. Kagan

the Center for Advanced Study in the Behavioral Sciences, the Netherlands Institute for Advanced Study, Ohio State University and Oxford University.

Mitchel Lasser

"It is impossible to come to NYU as a comparatist and not be excited about working with the remarkable scholars here," says Mitchel Lasser, a professor at Cornell Law School specializing in European Union law, comparative constitutional law and judicial process. "The strength and depth of the community is truly unique." Lasser, who serves at Cornell Law School as the director of graduate studies and as codirector of the Cornell Summer Institute of International and Comparative Law in Paris, will visit NYU in Fall 2006.

He is currently at work on *Comparative Law in Flux: The Judiciary at the Intersection of Legal Systems*, a monograph. His previous monograph, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, was published by Oxford University Press in 2004. He has also published articles in the *American Journal of Comparative Law, Archives de philosophie du droit*, the *Cornell Law Review*, the



Harvard Law Review, Revue trimestrielle de droit civil and the Yale Law Journal. After earning a B.A.

in French literature from Yale University, Lasser went on to receive a J.D. from Harvard Law School, an M.A. from Yale's

Department of French Literature and a Ph.D. from Yale's Department of Comparative Literature. As a Fulbright Scholar in France in 1993-94, Lasser researched the French civil judicial system. He was the Fulbright Distinguished Visiting Chair at the Law Department of the European University Institute in Florence, Italy, in 2003 and has been a visiting professor at the University of Paris-I (Panthéon-Sorbonne), the Institut d'Etudes Politiques de Paris, the University of Geneva and the University of Lausanne.

Christopher Leslie

A specialist in antitrust and business law, Christopher Leslie, a professor at the Illinois Institute of Technology's Chicago-Kent College of Law, will visit NYU in Spring 2007. He will teach a class on antitrust law and a seminar on antitrust law and intellectual property rights while working on antitrust research involving "the intersection of antitrust law and intellectual property rights, including how antitrust law should address invalid patents."

Leslie, who has been a visiting professor at Stanford Law School and the University of Texas School of Law, earned a B.A. in economics and political science from the University of California, Los Angeles; an M.P.P. in public policy from Harvard University's Kennedy School of Government, where his concentration was in science and technology

public policy; and a J.D. from the University of California, Berkeley. He clerked for Judge Diarmuid O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit, and worked as a litigation associate at Pillsbury Madison



Christopher Leslie

& Sutro and Heller Ehrman, both San Francisco firms.

The coauthor of *Gilbert Law Summaries: Antitrust* (West Group, 2004), Leslie has also published articles in numerous publications, including the *Harvard Civil Rights-Civil Liberties Law Review*, the *Ohio State Law Journal*, the *Texas Law Review*, the *UCLA Law Review* and the *Wisconsin Law Review*. He currently serves on the executive committee of the Section on Antitrust Law and Trade Regulation of the Association of American Law Schools.

R. Anthony Reese

Intellectual property specialist R. Anthony Reese will visit NYU in the 2006-07 academic year; he is the Thomas W. Gregory Professor of Law at the University of Texas at Austin, and focuses on copyright, trademark and Internet aspects of intellectual property law, as well as Russian legal history. At the University of Texas School of Law, Reese teaches Copyright, Trademark, Introduction to Intellectual Property, Intellectual Property in Cyberspace, Digital Copyright and Intellectual Property Theory.

In addition to teaching at UT, Reese has been a visiting professor at Stanford Law

School and, through the Joint International IP Law Summer Program, at the University of Victoria and Oxford University. Reese is the coauthor of *Internet Commerce: The Emerging Legal Framework* (Foundation Press, 2006) and is



R. Anthony Reese

currently collaborating on the forthcoming Copyright, Patent, Trademark and Related State Doctrines. He has published articles in the Berkeley Technology Law Journal, the Boston College Law Review and the Stanford Law Review, among other publications.

Reese received his B.A. in Russian language and literature from Yale University in 1986. From 1986 to 1988, he taught English for the Yale-China Assocation in Tianjin and Hunan. Reese earned his J.D. from Stanford Law School in 1995, and subsequently clerked for Judge Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit. He worked as an associate at Morrison & Foerster in San Francisco from 1996 to 1998 and, since 1999, has served as special counsel for the firm.

Catherine Sharkey

Catherine Sharkey is an associate professor at Columbia Law School specializing in torts, punitive damages, class actions, remedies, product liability and empirical legal studies. She has taught courses such as Torts, Modern Remedies, Products Liability, and Tort Reform and the American

Tort System. Sharkey will make her first visit to the NYU School of Law in Fall 2006.

Sharkey earned a B.A. in economics from Yale University, an M.Sc. in economics for development from Oxford University and a J.D. from



Catherine Sharkey

Yale Law School, where she served as executive editor of the *Yale Law Journal*. She was a Rhodes Scholar from 1992 to 1994 and a Temple Bar Scholar in 1999.

She clerked for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Justice David H. Souter of the U.S. Supreme Court. She later worked as a Supreme Court and appellate litigation associate at the law firm of Mayer, Brown, Rowe & Maw in New York City from 2000 to 2002.

Sharkey joined the Columbia Law School faculty in 2003 after a year as a John M. Olin Jr. Fellow at its Center for Law and Economic Studies. She has served as a cochair of the Faculty Clerkships and Judicial Relations Committee and as a member of the Faculty Appointments Committee.

Sharkey is a senior editor of the *Journal* of Tort Law, and has published articles in the New York University Law Review, the UCLA Law Review and the Yale Law Journal.

During her undergraduate years at Yale University, Sharkey also excelled athletically: She played on the all-American women's lacrosse second team and was a finalist for the National Collegiate Athletic Association's Woman of the Year Award.

James Whitman

James Whitman, the Ford Foundation Professor of Comparative and Foreign Law at Yale Law School, will teach Comparative Law during his Fall 2006 visit. He will also work on an article concerning the nature of "consumerism in global context."

Before joining the Yale Law School faculty in 1994, Whitman was an associate professor at Stanford Law School. He has also been a Robbins Senior Fellow at the Boalt Hall School of Law; a Jean Monnet Fellow at the European University Institute in Florence, Italy; a Berlin Prize Fellow at the American Academy in Berlin; and a fellow at the Max Planck Institute for European Legal History in Frankfurt.

Whitman received a B.A. in comparative literature summa cum laude from Yale University, an M.A. in European history from Columbia University, a Ph.D. in intellectual history from the University of Chicago and a J.D. from Yale Law School, where he was

senior editor of the

Yale Law Journal. He

later clerked for Judge

Ralph K. Winter of the

U.S. Court of Appeals

for the Second Cir-

cuit. Whitman's books

include The Legacy of

Roman Law in the Ger-

man Romantic Era:

Historical Vision and



James Whitman

Legal Change (Princeton University Press, 1990), Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (Oxford University Press, 2003) and The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial (Yale University Press, forthcoming). Whitman has also published articles in numerous journals, including the Columbia Journal of *European Law,* the *University of Chicago Law Review* and the *Yale Law Journal.*

Kenji Yoshino

Kenji Yoshino, who will visit in the 2006-07 academic year, is a professor of law and the former deputy dean of intellectual life at Yale Law School. He specializes in constitutional law, antidiscrimination law, law and literature, and Japanese law and society.

Besides teaching a freshman honors seminar at NYU with Professor Carol Gilligan, Yoshino plans to pursue "two major projects: one on the relationship between equality and liberty in American constitutional law, and one on the role of utopian imagination in law." He adds, "Given the comparative dimension of some of my work, the cosmopolitan nature of the school and city are also a draw."

After receiving his J.D. from Yale Law School in 1996, where he was the articles editor of the *Yale Law Journal*, Yoshino clerked



for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit. He earned a B.A. in English and American literature and language from Harvard University in 1991 and, in 1993, an M.Sc. in manage-

Kenji Yoshino

ment studies from Oxford University, where he was a Rhodes Scholar.

Yoshino, the author of *Covering: The Hidden Assault on Our Civil Rights* (Random House, 2006), has published articles in the *New York Times*, the *Stanford Law Review* and the *Yale Law Journal*.

Kathryn Zeiler

An associate professor of law at Georgetown University Law Center, Kathryn Zeiler is also the codirector of Georgetown's Law and Economics Workshop Series. During her visit to NYU in the 2006-07 academic year, Zeiler plans to collaborate with Professor Kevin McCabe, an expert in experimental economics at George Mason University, on several economics experiments. One concerns the ways in which third-party insurance affects both compensation for injuries and the "incentives for potential defendants to take efficient precautions." Another will study the influence of legal reform on the "behavior of market actors before damages are incurred by potential plaintiffs."

Zeiler earned her B.S. in business from Indiana University, an M.S. in taxation from Golden Gate University, an M.S. in social sciences and a Ph.D. in economics from the California Institute of Technology and a J.D. from the University of Southern California Law School. She was a senior tax consultant with Ernst & Young for four years.

She has published articles in the American Economic Review, the Virginia



Kathryn Zeiler

Law Review and the Yale Journal of Health Policy, Law and Ethics. She is working on a project about jury verdicts and posttrial outcomes, and a project on the legal implications of "willingness to

pay/willingness to accept gaps" in light of recent findings concerning endowment effect theory.

Returning Visiting Faculty

The Gruss Visiting Professor of Law, **Moshe Halbertal** is a professor at Hebrew University of Jerusalem, and a fel-

low at the Hartman Institute of Advanced Jewish Studies. His scholarship focuses on hermeneutics and the interpretation of Jewish law. Much of his scholarship is concerned with the question, "What can we learn from Jewish law



Moshe Halbertal

about the concept of law?" Halbertal, who has also served as the Gruss Professor at the Harvard and University of Pennsylvania law schools, received the Michael Bruno Award, given to pioneering Israeli scholars under the age of 50, in 1999. His books have been published to critical acclaim both in Israel and the United States.

Arthur Miller is nationally recognized for his work on court procedure; he has written or cowritten more than 40 books on the subject. As the Bruce Bromley



Arthur Miller

Professor of Law at Harvard Law School, he has also gained acclaim for his work on the right of privacy. Miller, who will be teaching the firstyear course Procedure this fall, has also made a name for himself as a television host. He had his own show, *Miller's Court*, for eight years and has moderated numerous PBS series. Miller has an active law practice; he has argued cases in all of the 13 U.S. Circuit Courts of Appeals, as well as in the U.S. Supreme Court. He currently serves as an adviser to the American Law Institute's project on Principles of the Law of Aggregate Litigation. Miller previously visited NYU in the fall of 2005.

In the fall of 2006, **Daniel Rubinfeld**, the Robert L. Bridges Professor of Law and professor of economics at the University of

California, Berkeley, will visit NYU for the fifth time. He will teach quantitative methods and antitrust law and economics.

A leading law

scholar. Rubinfeld

has written arti-

economics

and



Daniel Rubinfeld

for the District of

Columbia and Justice

William J. Brennan Jr.

of the U.S. Supreme

Court, he returned

to the University of Chicago Law School

as a professor in 1973.

He served as dean

from 1987 to 1993 and

cles on antitrust and competition policy, law and economics, voting rights and federalism. He has also cowritten two economics textbooks with M.I.T. professor Robert Pindyck, *Microeconomics* (Mac-Millan, 1989) and *Econometric Models and Economic Forecasts* (McGraw-Hill, 1976). Rubinfeld is a former deputy assistant attorney general for the Antitrust Division of the U.S. Department of Justice.

Geoffrey Stone, who will visit in Fall 2006, is the Harry Kalven Jr. Distinguished Service Professor of Law at the University of Chicago Law School. A graduate of the Wharton School of Business, Stone has a J.D. from the University of Chicago. After clerking for Judge J. Skelly Wright of the U.S. Court of Appeals



Geoffrey Stone

as provost of the University of Chicago from 1993 to 2002. A preeminent First Amendment scholar, Stone wrote about the effects of war on the First Amendment in *Perilous Times* (W.W. Norton, 2004), which received the *L.A. Times* Book Award and the Robert F. Kennedy National Book Award. During his visit, Stone will teach First Amendment Rights of Expression and Association.

Faculty in Residence

Bernard Grofman

A political science and social psychology professor at the University of California, Irvine, and an adjunct professor of economics, Bernard Grofman plans to pursue several research projects during his Fall 2006 visit to NYU.

"Some deal with the interactions between law and social science in defining standards for equal protection of racial and political minorities," he says, "and some with ways to make use of mathematical social choice theory to model the evolution of legal jurisprudence."

Grofman earned a B.S. in mathematics from the University of Chicago, and an M.A. and Ph.D. in political science from the same institution. He is the coauthor of *Minority Representation and the Quest for Voting Equality* (Cambridge University Press, 1992), the editor of *Political Gerrymandering and the Courts* (Agathon Press, 1990) and the coeditor of *Quiet Revolution in the South: The Impact of the Voting Rights Act,* 1965-1990 (Princeton University Press, 1994), which won the Richard Fenno Prize of the Legislative Studies Section of the American Political

Science Association. He has published articles in the American Journal of Political Science, the Journal of Law and Politics, Legislative Studies Quarterly and the Texas Law Review, among others. Grofman has



Bernard Grofman

been an expert witness in redistricting and voting rights cases in more than a dozen states, and his work on voting rights has been cited in 11 U.S. Supreme Court cases.

Gerald Korngold

Shortly after finishing a nine-year stint as the dean of the Case Western Reserve University School of Law, Gerald Korngold will visit NYU for the 2006-07 academic year. A law professor at Case since 1987, Korngold became the Everett D. and Eugenia S. McCurdy Professor of Law at the school in 1994, and he also served as the interim dean of Case's Weatherhead School of Management in 2004.

Korngold, who specializes in property and real estate law, plans to spend time at NYU working on articles and on new editions of the books *Cases and Text on Property* (Aspen Publishing, 2004) and *Real* *Estate Transactions: Cases and Materials on Land Transfer, Development and Finance*

(Foundation Press, 2002), both of which he coauthored. Korngold has published articles in the *Cornell Journal of Planning and Urban Issues*, the *Real Estate Law Journal* and the *Texas Law Review*. He received a B.A. in history and



Gerald Korngold

a J.D. from the University of Pennsylvania, where he edited the University of Pennsylvania Law Review.

Korngold anticipates a fruitful year. "NYU will provide me with a unique opportunity," he says, "since I am interested in international, interdisciplinary and theoretical as well as 'real world' issues and approaches."

Stephen Macedo

Stephen Macedo is the Laurance S. Rockefeller Professor of Politics and the University Center for Human Values at Princeton University, as well as the center's director. Macedo, who will be in residence at NYU in 2006-07, plans to complete a book on "the moral significance of the American national community and its future," in addition to a piece on the effects of a country's participation in international organizations on its domestic politics (the latter with Princeton Professor Robert Keohane).

Macedo is the coauthor of *Democracy at Risk: How Political Choices Undermine Citizen Participation, and What We Can Do About It* (Brookings Institution Press, 2005) and the author of *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Harvard University Press, 2000) and *The New Right v. the Constitution* (Cato Institute, 1986).

He received his B.A. from the College of William and Mary; master's degrees from the London School of Economics and

Oxford University; and an M.A. and Ph.D. from Princeton. As the founding director of the Program in Law and Public Affairs at Princeton and chair of the Princeton Project on Universal Jurisdiction from



Stephen Macedo

2000 to 2003, Macedo led a project to study universal jurisdiction and helped produce the *Princeton Principles on Universal Jurisdiction* (Princeton University Publications, 2001), which was disseminated by the U.N.

Jack Mintz

After seven years as president and chief executive officer of the C.D. Howe Institute,



Jack Mintz

an independent policy think tank in Toronto, Jack M. Mintz will be in residence at NYU in Spring 2007. He plans to return to his own research, including a book on fiscal federalism in Canada.

Mintz is a professor of business

economics at the University of Toronto's Joseph L. Rotman School of Management, as well as codirector of the International Tax Program at the university's Institute of International Business. He is the author of Most Favored Nation: Building a Framework for Smart Economic Policy (C.D. Howe Institute, 2001), the coauthor of Taxation of Virgin and Recycled Material: Analysis and Policy (Canadian Council of Ministers of Environment, 1995) and Dividing the Spoils: The Federal-Provincial Allocation of Taxing Powers (C.D. Howe Institute, 1992), and the founding editorin-chief of International Tax and Public Finance. In 2005 the British magazine Tax Business named him the 27th most influential tax expert in the world.

Mintz received a B.A. in economics from the University of Alberta, an M.A. in economics from Queen's University in Kingston, Ontario and a Ph.D. from the University of Essex in Colchester, England.

Samuel Scheffler

Samuel Scheffler, the Class of 1941 World War II Memorial Professor of Philosophy



versity of California, Berkeley, teaches in both the philosophy department and the Jurisprudence and Social Policy Program of the Boalt Hall School of Law. During his visit in the coming aca-

and Law at the Uni-

demic year, Scheffler plans to work on a new book. He has already published *The Rejection of Consequentialism* (Clarendon Press, 1982), *Human Morality* (Oxford University Press, 1992) and *Boundaries and Allegiances* (Oxford University Press, 2001). He has written articles on topics such as terrorism, egalitarian liberalism, the value of equality, and morality and self-interest, and is an advisory editor of *Philosophy and Public Affairs*. Scheffler, who received his A.B. from Harvard University and a Ph.D. from Princeton University, won Guggenheim and National Endowment for the Humanities Fellowships, a University of California President's Research Fellowship in the Humanities and a visiting fellowship at Oxford University's All Souls College. In 2004 he was elected a fellow of the American Academy of Arts and Sciences. Scheffler serves as the chair of the advisory board of the Kadish Center for Morality, Law and Public Affairs.

Eugene Volokh

Eugene Volokh, the Gary T. Schwartz Professor of Law at the University of California, Los Angeles, earned a B.S. in math and computer science from UCLA at age 15. He

graduated first in

his class from UCLA

School of Law at 24

and joined the fac-

ulty two years later.

He has taught free

speech law, copy-

right law, the law

of government and

religion, criminal

law and a seminar



on firearms regulation.

During his Spring 2007 visit to NYU, he will deliver the second annual Friedrich A. von Hayek Lecture in Law. A top constitutional scholar, Volokh has written The First Amendment and Related Statutes (Foundation Press, 2005), The Religion Clauses and Related Statutes (Foundation Press, 2005) and Academic Legal Writing (Foundation Press, 2004). He has published nearly 50 law review articles and more than 75 op-ed pieces in numerous publications. Volokh clerked for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit and Justice Sandra Day O'Connor of the U.S. Supreme Court. In 2005, the Los Angeles and San Francisco Daily Journals named Volokh one of the top 100 lawyers in California. Volokh is an academic affiliate with Mayer, Brown, Rowe & Maw.

Returning Faculty in Residence

Richard Epstein, who will make his second visit to campus in Fall 2006, is known for his research and writings on a broad range of constitutional, economic, historical and philosophical subjects. At the University of Chicago Law School, where he is the James Parker Hall Distinguished Service Professor of Law, he has taught communications law, constitutional law, contracts, criminal law, health law, jurisprudence, labor law, patents, property and torts, to name a few subjects.

Epstein has been the Peter and Kirstin Bedford Senior Fellow at Stanford University's Hoover Institution



Richard Epstein

on War, Revolution and Peace since 2000. A former editor of the *Journal of Legal Studies* and the *Journal of Law and Economics*, he is now a director of Chicago's Olin Program in Law and Economics, which applies economic research findings to the analysis of legal problems. His most recent book is *How Progressives Rewrote the Constitution* (Cato, 2006).

The leading scholar of violence risk assessment, **John Monahan** is the John S. Shannon Distinguished Professor of Law and a professor of psychology and psychiatric medicine at the University of Virginia School of Law. While visiting in Fall 2006, he plans to study the use of social science research by courts, and the legal regulation of treatment for mental disorders.

Monahan, who visited the Law School in 2000 and 2004, has also been a visiting scholar at the American Academy in Rome, Harvard Law School and All Souls College,



Oxford. He has been a Guggenheim Fellow, and has held fellowships at the Center for Advanced Study in the Behavioral Sciences and at Stanford Law School. The founding president of the Ameri-

John Monahan

can Psychological Association's Division of Psychology and Law, Monahan is also a twotime winner of the Manfred Guttmacher Award of the American Psychiatric Association for his books *The Clinical Prediction of Violent Behavior* (1982) and *Rethinking Risk Assessment* (2002).

Gerald Rosenfeld, the CEO of Roth-

schild North America, will be in residence in the coming academic year as a director of the School of Law's Leadership Program in Law and Business. Last year he was a senior fellow at the NYU Pollack Center for Law and Business. Rosenfeld



Gerald Rosenfeld

will also teach Professional Responsibility and Ethics for both School of Law and Stern School of Business students. An investment banker for more than 25 years, Rosenfeld has been an adjunct professor of finance at Stern since 1992. He has a B.C.E. in civil engineering from the City College of New York, a master's in engineering mechanics from the City University of New York and a Ph.D. in applied mathematics from NYU. Rosenfeld is a fellow of the American Academy of Arts and Sciences.

Alexander Fellow 2006-07

Jeanne Fromer

When she visits NYU in the 2006-07 academic year, Alexander Fellow Jeanne Fromer plans to "explore informational aspects of patent law and to begin con-



structing a theory of statutory design based on the informational obligation that statutes convey their meaning to the public." Fromer received a B.A. in computer science summa cum laude from Columbia University's Barnard

Jeanne Fromer

College and an S.M. in electrical engineering and computer science from the Massachusetts Institute of Technology. At M.I.T. she was a National Science Foundation Graduate Research Fellow.

Fromer earned a J.D. magna cum laude from Harvard Law School, where she was the articles and commentaries editor of the *Harvard Law Review* and the editor and symposium articles coordinator of the *Harvard Journal of Law and Technology*. Fromer was a fellow at Yale Law School with Professor Jack Balkin's Information Society Project, and has clerked for Judge Robert D. Sack of the U.S. Court of Appeals for the Second Circuit and Justice David H. Souter of the U.S. Supreme Court.

Furman Academic Fellow 2006-07

Harlan Grant Cohen

Harlan Grant Cohen returns for a second year as a Furman Fellow and as coordinator of the Furman Program. His scholarship focuses on the history and theory of international law. His current projects include an attempt to rethink the sources of international law and an exploration of the relationship between American national identity and domestic debates over international law.

Cohen received his J.D. magna cum laude from NYU in 2003. A member of the Order of the Coif, Cohen was awarded the

Maurice Goodman Memorial Prize for outstanding scholarship and character. He received his B.A. in history and international studies from Yale University, where he was awarded the Sturley Prize



Harlan Grant Cohen

in English History and the International Security Studies Senior Essay Prize in 1998. He received an M.A. in history from Yale in 2000. Cohen has also clerked for Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and worked as a litigation associate at Cleary Gottlieb Steen & Hamilton.

Cohen has published pieces in the Berkeley Journal of International Law, the New York University Law Review and the Yale Journal of International Law.

Global Visiting Professors of Law

Victor Ferreres Comella

Victor Ferreres Comella is a professor of constitutional law at the Pompeu Fabra University in Barcelona, Spain. He graduated from the University of Barcelona, Faculty of Law, and holds a doctorate from Yale Law School. He has been a visiting professor at the law school of Puerto Rico University and the European Humanities Institute in Minsk, Belarus. A book based on his doctoral thesis won the Francisco Tomás y Valiente Prize in Constitutional Law, awarded by the Spanish Constitutional Court.

Dennis Davis

Dennis Davis is a judge of the High Court of South Africa and judge president of South Africa's Competition Appeal Court. Before his appointment to the bench, Davis



Victor Ferreres Comella



Dennis Davis

was a professor of law at the University of Cape Town and the University of the Witwatersrand, as well as director of the Centre for Applied Legal Studies at Witwatersrand. He continues to teach tax, competition and constitutional law as an honorary professor at the University of Cape Town. Davis is cowriting a book on lawyering in South Africa and the broader lessons in terms of global human rights.

Richard Goldstone

Richard Goldstone retired in 2003 from the Constitutional Court of South Africa and is chancellor of the University of Witwatersrand. From 1994 to 1996, Goldstone was chief prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. He has also served as cochairman of the Independent International Commission on Kosovo, chairman of the Commission of Inquiry Regarding Public Violence and Intimidation, and president of the National Institute for Crime Prevention and the Rehabilitation of Offenders. Judge Goldstone has received many human rights awards and has lectured on human rights and South African constitutional issues at universities around the world. He was a global visiting professor of law in 2003-04.

Leslie Green

Leslie Green is a professor of law and philosophy at Osgoode Hall Law School at York University in Toronto. He is a regular visiting professor at the University of Texas at Austin School of Law. A former fellow of Oxford's Lincoln College, he has also taught at Queen's University in Ontario and at the Boalt Hall School of Law. Green works mainly in jurisprudence and in related areas of political philosophy, as well as in sexuality and the law. He is the author of *The Authority of the State* (Oxford University Press, 1988) and coeditor of *Law and the Community: The End of Individualism* (Carswell, 1989).

Gérard Hertig

Gérard Hertig is a professor of law at the Swiss Federal Institute of Technology Zurich, where he oversees the postgraduate intellectual property program. He was previously



Richard Goldstone







Gérard Hertig

Wolfgang Kerber

a professor of administrative law and director of the Centre d'Etudes Juridiques Européennes at the University of Geneva Law School. His recent publications include "An Agenda for Reform: Company and Takeover Law in Europe" with Joseph A. McCahery in Reforming Company and Takeover Law in Europe (Oxford University Press, 2004); "On-Going Board Reforms: One Size Fits All and Regulatory Capture" in the Oxford Review of Economic Policy; The Anatomy of Corporate Law, A Comparative and Functional Approach, with Reinier Kraakman, et al. (Oxford University Press, 2004); and "Four Predictions about the Future of E.U. Securities Regulation" with Ruben Lee in the Journal of Corporate Law Studies.

Wolfgang Kerber

Wolfgang Kerber is a professor of economics at Philipps University of Marburg, Germany. In recent years, his main fields of research have been European and international competition policy, and multilevel legal systems and regulatory competition. Kerber has been director of the Walter Eucken Institute in Freiburg and professor of economics at the Ruhr-University Bochum. His most recent publications include articles in the European Journal of Law and Economics, the Journal of Competition Law and Economics and the Journal of European Public Policy and World Competition.

Martti Koskenniemi

Martti Koskenniemi, a member of the United Nations' International Law Commission, is a professor at the Academy of Finland. Before taking a position as a professor of international law at the University of Helsinki in 1995, he was the counselor for legal affairs at the Ministry for Foreign Affairs of Finland. He has represented Finland in numerous international bodies, among them, the U.N. General Assembly and the Security Council. He also litigated at the International Court of Justice. Koskenniemi is a highly respected international law scholar. He has written many publications; among them From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press, 2006) and The



Martti Koskenniemi



Annette I

Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge University Press, 2001) are leading works in the theory and history of international law. Koskenniemi is a codirector of the Institute for International Law and Justice's Program in the History and Theory of International Law at New York University.

Annette Kur

Annette Kur is a senior member of the research staff and unit head at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich, and an associate professor at the University of Stockholm. She serves as an executive committee member and presidentelect of the Association for Teaching and Research in Intellectual Property, and as a representative of the Max Planck Institute in the World Intellectual Property Organization's Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications. She has lectured on trademark law, intellectual property law and private international law at Munich University, the Munich Intellectual Property Law Center and the Swedish School of Economics, Helsinki. Kur is a member of the foreign faculty at Santa Clara University and the author of books and numerous articles in the fields of national, European and international trademark, international jurisdiction, and unfair competition and industrial design law.

Chang Hee Lee

Chang Hee Lee is a professor of law at Seoul National University, where he has taught taxation since 1997. He has also taught taxation as a visiting professor of law at

Harvard University and the University of Tokyo. He has published a treatise of more than a thousand pages on Korean tax law, and several dozen articles. His representative publications in English



Chang Hee Lee

include "Impact of E-Commerce on Allocation of Tax Revenue Between Developed and Developing Countries," first published in *Tax Notes International* and updated in the *Journal of Korean Law*; "Law and Taxation of Corporate Merger and Division in Korea," in the *Journal of Korean Law*; "Instability of the Concept of Dependent Agent Permanent Establishment"; and "A Strategic Approach for Capital Importing Countries Under the Arm's Length's Principle," in *Tax Notes*.

Ziba Mir-Hosseini

Ziba Mir-Hosseini is a research associate of the London Middle East Institute and the Center for Islamic and Middle Eastern Law, both at the School of Oriental and African Studies at University of London. An anthropologist by training, Mir-Hosseini is a freelance researcher and consultant with interests in law, religion and gender.

She is the author of two well-received books; her new one, *Islam and Democracy in Iran: Eshkevari and the Quest for Reform* (I.B. Tauris, 2006), cowritten with Richard Tapper, deals with the reform movement in Iran and Islamic family law and gender issues. Mir-Hosseini has also codirected (with Kim Longinotto) two award-winning feature-length documentary films on contemporary issues in Iran: *Divorce Iranian Style* (1998) and *Runaway* (2001).

Carlos Rosenkrantz

Carlos Rosenkrantz is a professor at the University of Palermo Law School, Buenos Aires, Argentina, and a visiting professor at the Pompeu Fabra University in Barcelona, Spain. He also is affiliated with the Centro de Estudios Institucionales, a legal and political policy institute. For more than 10 years, Rosenkrantz has been integrally involved in the Argentine constitutional reform process and the reform of private law and private procedure. In the 1980s, he served on the commission headed by the late Carlos Nino, the chief architect of constitutional reform in Argentina. Rosenkrantz also served as chief adviser to former President Alfonsin during the Argentine Constitutional Convention in 1994.



Ziba Mir-Hosseini



Carlos Rosenkrantz

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FACULTY SCHOLARSHIP

Each year, we highlight some of our faculty's notable scholarship. Here we feature four works that examine topics as diverse as aggressive sales tactics and the development of constitutional law in early America.

Bundling and Consumer Misperception

OREN BAR-GILL explains how competitive bundling in response to consumer misperception can have far-reaching economic effects.



We all like to think of ourselves as smart shoppers, but consumers often misjudge the true value of products and services they buy. As Oren Bar-Gill points out in this excerpt of his essay "Bundling and Consumer Misperception," published in the University of Chicago Law Review (Volume 73, Winter 2006), sellers can take advantage of this confusion by packaging items of different value together to make them more attractive to consumers. The effect of such strategic bundling can be beneficial or detrimental to consumers and to state policies, depending on the nature of the misperception to which sellers are responding.

onsumer misperception of the costs and benefits associated with a product or service is prevalent. It can be the product of imperfect information or imperfect rationality (or both). It can be independent of any action taken by sellers. It can be instigated by sellers. And it can be mitigated by sellers.

This essay takes consumer misperception as given and studies one common strategy employed by sellers facing such misperception: the bundling strategy. "Bundling" in this essay is used in a somewhat broader sense than is conventional in the antitrust and industrial organization literatures. I define the bundling of products A and B to include any case where a consumer purchasing product A from seller X has a sufficiently strong incentive to purchase product B from the same seller. In a second significant departure from the antitrust and industrial organization literatures, I focus on bundling by sellers operating in competitive markets.

Consider first consumer misperception about the value of a product. To fix ideas, assume that a consumer underestimates the amount of in-home printing she will choose to do if she has a printer at home, thus underestimating the value to her of owning a printer. Such underestimation of value and of use will also lead the consumer to underestimate the number of ink cartridges she will purchase over the life of the printer. For instance, the consumer may estimate that she will need 50 ink cartridges, when in fact she will need 100 cartridges. The argument is that under these assumptions a seller offering printers only will find it hard to compete with a seller who bundles printers and ink, that is, who, through technological compatibility constraints and/or intellectual property protection, forces consumers who bought its printers to also purchase its ink cartridges.

The competitive advantage of the bundling seller can be explained as follows. In a competitive market a seller offering only printers will have to price its printers at the marginal cost of a printer, say \$1,000. Consumers who buy printers from this seller will know that they will have to buy their ink from another seller at the marginal cost of ink, say \$10. Accordingly, the total cost of printing perceived by a consumer purchasing a printer from the printer-only seller is \$1,500 (i.e., \$1,000 + 50 × \$10). (The actual, as opposed to perceived, total cost of printing is \$1,000 + 100 × \$10 = \$2,000.)

Now consider a bundling seller. This seller may offer the same (or equivalent) printer at a below-cost price of \$500 and cover its losses by charging \$15 per ink cartridge. The total cost of printing perceived by a consumer purchasing a printer from the bundling seller is \$1,250 (= \$500 + 50 × \$15). (The actual, as opposed to perceived, total cost of printing is $500 + 100 \times 15 = 2,000$, as in the no-bundling case. In a competitive market, the total price collected by the bundling seller cannot exceed the total cost, \$2,000 [= \$1,000 cost of a printer + 100 ink cartridges × \$10 cost of an ink cartridge].) Given consumer underestimation of ink usage, sellers in a competitive market must bundle printers and ink.

Overestimation of value and of use can similarly induce a bundling response by sellers. Consider the health club market. Sellers can charge a per-visit fee. Sellers can also offer a one-year subscription, which can be viewed as an intertemporal bundle (access to the club in period 1 is bundled with access in period 2). For consumers who overestimate the number of visits they will make to the health club, the bundle/ subscription will be the preferred option. Accordingly, in a competitive market, health clubs who fail to offer subscriptions will be at a disadvantage.

The welfare implications of bundling depend on the type of misperception that triggers the bundling response. Absent bundling, underestimation of value leads to too little trade. In the printers and ink example this means that too few printers will be purchased. Bundling, with its accompanying backloaded pricing, generates an underestimation of cost that offsets the underestimation of value. Bundling restores efficiency. Overestimation of value, on the other hand, leads to excessive trade. Bundling exacerbates this inefficiency. Absent bundling with per-product marginal cost pricing, the overestimation of value is partially offset by the overestimation of cost. Bundling, with its accompanying front-loaded pricing, eliminates this beneficial offsetting effect.

The bundling strategy has distributional effects as well. When bundling is a response to underestimation of value and of use, highvalue/use consumers end up cross-subsidizing low-value/use consumers. When bundling is a response to overestimation of value bundling reduces welfare, regulation that discourages bundling may provide a valuable tool for policy-makers.

It is important to emphasize at the outset that the proposed account of bundling, and of the pricing of the bundle and its components, as a response to consumer misperception is not offered as an exhaustive or even a dominant account. There are other important explanations for the bundling strategy that have nothing to do with consumer misperception. In particular, many bundles can be justified on cost-saving grounds. Moreover, many observed bundles can be explained by a combination of the misperception-based and cost-based accounts.

Analysis

When consumers misperceive the costs or benefits of one product, competition may force sellers to bundle this product with another product. I allow for separate pricing of the two products, but show that the competitive response to consumer misper-

Sellers often respond to consumer misperception by bundling the misperceived product with another, accurately valued one.

and of use, low-value/use consumers end up cross-subsidizing high-value/use consumers. The welfare implications of these distributional effects depend on the identity of the high-value/use and low-value/use groups.

Misperception of value is not the only type of misperception that can trigger a bundling response. Price misperception can similarly force bundling of the product whose price is misperceived and another product whose price is accurately perceived. The efficiency implications are straightforward. Bundling exacerbates the overconsumption problem created by underestimation of price. When overestimation of price leads to underconsumption, bundling alleviates this inefficiency.

The main goal of this essay is to argue that competitive bundling in response to persistent consumer misperception is both predicted in theory and observed in practice. While mainly descriptive, the analysis in this essay has normative and prescriptive implications. I show that bundling has both efficiency and distributional consequences. The feasibility of bundling can either increase or reduce welfare, depending largely on the type of misperception that triggers the bundling response. When ception will often entail a single price. It is important to note that an effective bundle can exist even when two (or more) distinct products are separately priced. This bundle can be sustained through technology (i.e., compatibility constraints), law (i.e., contractual obligation or intellectual property rights) or simply economic or psychological switching/transaction costs.

Consider a competitive market for printers. Assume, however, that once a consumer buys a brand X printer she can buy ink cartridges only from X (as a matter of technological compatibility). How will sellers price their product? Or, more accurately, how will they price their two bundled products: printers and cartridges?

Take a specific example. Let the cost of a printer be \$1,000 and the cost of an ink cartridge be \$10. Assume that the seller knows that an average consumer will buy 100 cartridges over the life of the printer. (Inelastic demand is assumed for expositional simplicity.) The total per-consumer cost is thus \$2,000. If consumers are homogeneous in their printing practices, and fully aware of their expected use of the printer, then a continuum of printer-ink price pairs is possible. To see this, let p_p and p_i denote the price of a

printer and of an ink cartridge, respectively. The consumer thus expects to pay a total price of $P = p_p + 100 \times p_i$. Competition guarantees that the total price P equals the total cost to the seller, namely, $P = p_p + 100 \times p_i = 2,000$. This competitive pricing condition is satisfied by per-product marginal cost pricing: $p_p = 1,000$ and $p_i = 10$. But it is also satisfied, for example, by $p_p = 0$ and $p_i = 20$ and by $p_p = 2,000$ and $p_i = 0$.

Consumer heterogeneity breaks the indifference between the infinity of possible price combinations. Consider two types of consumers: high-use consumers, who will buy 110 cartridges on average, and low-use consumers, who will buy 90 cartridges on average. Assume an equal number of highand low-use consumers. The $p_n = 0$, $p_i = 20$ price pair is unattractive to high-use consumers. These consumers expect to pay 2,200 under this pricing scheme, and will thus be quick to choose a seller offering a more balanced price combination. Specifically, highuse consumers will prefer per-product marginal cost pricing, under which they expect to pay 2,100. Conversely, the $p_p = 2,000$ and p_i = 0 price pair is unattractive to low-use consumers. These consumers expect to pay 2,000 under this pricing scheme, and will thus prefer per-product marginal cost pricing, under which they expect to pay 1,900. Heterogeneity will thus lead sellers to price both their printers and their ink cartridges at marginal cost. Perhaps more importantly, elastic demand also breaks the indifference between the possible price combinations and leads to marginal cost pricing.

Underestimation of Value/Use

Now assume that consumers are myopic and systematically underestimate the amount of printing they will do and thus the number of ink cartridges that they will buy. How does consumer misperception affect the above result that competition will lead to per-product marginal cost pricing?

For expositional clarity, I return to the unrealistic benchmark market where consumers are homogeneous with respect to their printing practices. Absent consumer misperception, any price combination satisfying $p_p + 100 \times p_i = 2,000$ can persist in a competitive market. What if consumers mistakenly believe that they will need 50 ink cartridges, rather than 100 cartridges-the true number of cartridges that they will use? Compare the perceived attractiveness of the three price pairs considered above. With the p_p = 2,000, p_i = 0 pricing scheme the consumer will perceive a total price of 2,000. With the $p_p = 1,000$, $p_i = 10$ pricing scheme the consumer will perceive a total price of

1,500. And with the $p_p = 0$, $p_i = 20$ pricing scheme the consumer will perceive a total price of 1,000. Since sellers get the same total price under the three pricing schemes, they will choose the $p_p = 0$, $p_i = 20$ scheme.

The preceding analysis focused on the pricing of printers and ink, taking the existence of the printer-ink bundle as given. But the formation of bundles in itself is an endogenous deliberate strategy. A main theme of this essay is that the bundling strategy is an effective, often inevitable, response to consumer misperception. The optimal pricing analysis demonstrated the dominance of the $p_p = 0$, $p_i = 20$ scheme. This pricing scheme cannot survive without effective bundling of printers and ink. Absent such bundling, a consumer who received a free printer under the $p_p = 0$, $p_i = 20$ scheme will buy ink at the marginal cost of $p_i = 10$ from an independent ink seller. Foreseeing this dynamic, no one will adopt the free printerexpensive ink tactic.

Making the $p_p = 0$, $p_i = 20$ scheme viable, however, is an attractive prospect. As shown above, if viable, this scheme dominates all other pricing schemes. Specifically, it dominates the pricing scheme that inevitably emerges absent bundling, the $p_p = 1,000$, p_i = 10, marginal-cost pricing scheme. Sellers thus have a powerful incentive to bundle printers and ink. Indeed, sellers employ technological compatibility constraints coupled with intellectual property protection to secure effective bundling of printers and ink.

What are the welfare implications of the bundling of printers and ink cartridges and specifically of the $p_p = 0$, $p_i = 20$ pricing scheme that such bundling entails? It may seem, at first blush, that there are no welfare implications. After all, under all three pricing schemes— $p_p = 2,000$, $p_i = 0$; $p_p = 1,000$, $p_i = 10$; and $p_p = 0$, $p_i = 20$ —the average consumer ends up paying the exact same amount: 2,000. But the three pricing schemes are not welfare neutral.

First, while the average consumer will end up paying the same amount under the different schemes, some consumers will benefit and some consumers will lose. Specifically, low-use consumers benefit from a move to the $p_p = 0$, $p_i = 20$ pricing scheme, while high-use consumers lose from such a move. This distributional effect can be seen as either good or bad, depending on the identity of the high-use and lowuse consumers, but it is not welfare neutral.

A second welfare implication derives from the distortion in the number of printers that consumers buy. Underestimation of value/use naturally leads to the purchase of too few printers, at least absent bundling. To see this let v denote the per-cartridge value



Bundling cures this problem. With bundling coupled with the $p_p = 0$, $p_i = 20$ pricing scheme, the average consumer perceives a total price of printing of 1,000, and will thus purchase a printer whenever 50v > 1,000 or v > 20. Efficiency is restored. The underestimation of value is perfectly offset by the underestimation of total price. Bundling in response to underestimation is welfare enhancing.

Overestimation of Value/Use

What would be the market response to the opposite kind of misperception—to overestimation, rather than underestimation, of value/use? While overestimation is less likely in the printer-ink context, I continue with this example for ease of exposition.

Again, I return to the unrealistic benchmark market where consumers are homogeneous with respect to their printing practices. Assume that consumers mistakenly believe that they will need 150 ink cartridges, rather than 100 cartridges—the true number of cartridges that they will use. Compare the perceived attractiveness of the three price pairs considered above. With the $p_p = 2,000$, $p_i = 0$ pricing scheme, the consumer will perceive a total price of 2,000. With the $p_p =$ 1,000, $p_i = 10$ pricing scheme, the consumer will perceive a total price of 2,500. And with the $p_p = 0$, $p_i = 20$ pricing scheme the consumer will perceive a total price of 3,000. Since sellers get the same total price under the three pricing schemes, they will choose the $p_p = 2,000$, $p_i = 0$ scheme.

"Please make a note—last year's \$39.95 value will be this year's \$49.95 value."

The optimal pricing scheme with overestimation of use— $p_n = 2,000$, $p_i = 0$ —is diametrically opposite to the optimal pricing scheme with underestimation of use— p_p = o, $p_i = 20$. The bundling of printers and ink, however, is equally necessary to support this very different pricing scheme. Absent such bundling, the consumer would purchase a printer at the marginal cost of $p_p = 1,000$ from an independent printer seller and then pick up free ink from the seller offering the p_p = 2,000, p_i = 0 scheme. Anticipating this dynamic, no one will adopt the expensive printer/free ink tactic. As with underestimation of use, here too sellers have a strong incentive to make the $p_p = 2,000$, $p_i = 0$ scheme viable, by bundling printers and ink. Arguably, effective bundling with $p_p = 2,000$, $p_i = 0$ pricing can be more easily achieved, as compared to effective bundling with $p_p = 0$, p_i = 20 pricing (as was needed with consumer underestimation of use). All sellers need to do is to price discriminate, in the sale of ink, between consumers who purchased their printer from the same seller and consumers who purchased their printer from a different seller. (Of course, ink arbitrage must also be prevented: A person who purchased a printer from an expensive printer/cheap ink

seller must not be allowed to buy a million ink cartridges at the low price and then resell most of these cartridges to consumers who purchased their printer from another seller.)

What are the welfare implications of the bundling of printers and ink cartridges, this time with the $p_p = 2,000$, $p_i = 0$ pricing scheme? As before, while the average consumer will end up paying the same amount under the different schemes, some consumers will lose. The distributional implications, however, are the reverse of those resulting from the $p_p = 0$, $p_i = 20$ scheme adopted in response to underestimation of value/use. High-value/ use consumers benefit from a move to the $p_p = 2,000$, $p_i = 0$ pricing scheme, while low-value/use consumers lose from such a move.

Now to efficiency: While bundling increased efficiency when adopted in response to underestimation of value/use, the opposite is true when bundling responds to overestimation of value/use. To see this, let *v* denote the per-cartridge value of printing to the average consumer. The total value of printing to the average consumer is thus 100*v*. Since the total cost of printing is 2,000 (recall that the cost of a printer is 1,000 and the cost of an ink cartridge is 10), it is efficient for a consumer to purchase a printer whenever 100*v* > 2,000 or *v* > 20.

With overestimation of value/use the perceived total value of printing is 150v (> 100v). Overestimation of value/use naturally leads to the purchase of too many printers even under marginal cost pricing. Under the $p_p =$ 1,000, p_i = 10, marginal-cost-pricing scheme, the average consumer perceives a total price of printing of 2,500 and will thus purchase a printer whenever 150v > 2,500 or v > 16.6. In particular, inefficient purchases will occur whenever 16.6 < v < 20. While overestimation produces inefficiency even absent bundling, bundling exacerbates this inefficiency. With bundling coupled with the $p_p = 2,000$, $p_i = 0$ pricing scheme, the consumer will purchase a printer whenever 150v > 2,000 or v > 13.3. Namely, the range of inefficient purchases increases from 16.6 < v < 20 without bundling to 13.3 < v < 20 with bundling.

Without bundling, marginal-cost pricing leads to overestimation of the total price in addition to the overestimation of value. And two overestimations are better than one: The overestimation of the total price partially offsets the overestimation of value, thus reducing the inefficiency. With bundling, sellers front-load the entire cost of printing onto the price of the printer, preventing overestimation of total price by the consumer. By removing the beneficial offsetting effect of price overestimation, bundling exacerbates the excessive trade problem.

Policy Implications

The preceding analysis suggests that sellers often respond to consumer misperception by bundling the misperceived product (or component) with another, accurately perceived product (or component). The analysis further suggests that such bundling can be either welfare reducing or welfare enhancing. When bundling exacerbates the adverse effects of consumer misperception, regulation designed to discourage bundling may be desirable.

In noncompetitive markets the antitrust prohibition on tying serves as a direct unbundling policy. One possibility is to extend this prohibition against bundling to competitive markets. In at least two contexts such an extension may have already occurred. First, where a base-good seller operating in a competitive market (for the base good) attempts to bundle the base good with aftermarket parts or service, the Supreme Court has suggested that antitrust tying law may apply (Eastman Kodak Co. v. Image Technical Services Inc., 504 US 451, 479 (1992)). Second, the Magnuson-Moss warranty legislation of 1975 restricts sellers' ability to bundle warranted goods with other goods regardless of the level of competition in the relevant market. Given the severity of this remedy, however, it should probably be used, if at all, only in extreme cases where the bundling practice is obviously harmful and where alternative policies are ineffective.

A less blunt unbundling policy is to promote competition on each component of the bundled product. If a consumer who bought a printer from seller A can buy ink cartridges from seller B, seller A would not be able to set low (below marginal cost) printer prices and high (above marginal cost) ink prices. This example suggests standardization as a potential solution to the bundling problem.

Looking at intertemporal bundling, the use of bundling tactics can be discouraged by reducing switching costs. The legal guarantee of cell phone number portability is an example of a policy aimed at increasing competition by reducing switching costs. Limiting sellers' ability to use early termination penalties in subscription contracts is another example of a competition-fostering unbundling policy.

Disclosure regulation may also serve as an unbundling policy. If sellers bundle printers and ink in response to consumer misperception about future use, regulation requiring sellers to provide "total cost of ownership" information may effectively prevent bundling. If a seller must advertise, in addition to the printer's stand-

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alone price, an inclusive price that adds the average cost of ink over the life of the printer, consumers will be less inclined to buy cheap printers that are bundled with expensive ink. If a mortgage lender or a credit card issuer is required to calculate for the consumer and explicitly state the total (or expected) interest and fee payments over the life of the loan, then consumers will be more likely to balance this total cost information against the shortterm perks offered by the lender or issuer on a bundled product.

Conclusion

Bundles are everywhere. Durables are bundled with parts and service. Subscriptionse.g., magazine subscriptions and health club subscriptions-can be characterized as an intertemporal bundle. Diagnostic services are bundled with treatment services. Products are bundled with selling services (e.g., showrooms and knowledgeable salespersons). Michael Spence, in a seminal contribution, argued that almost every product "should be thought of as a bundle of characteristics." In the modern world economy these bundled characteristics should be broadly defined to include contractual provisions and potentially independent products.

The motivations for bundling are numerous: from leveraging of monopoly power to product differentiation to simple cost saving. This essay explored another motivation for bundling. It presented bundling as a strategic response to consumer misperception. The welfare and policy implications of bundling depend on the motivation for the observed bundling. Monopoly leveraging is bad. Cost saving is good. Bundling in response to consumer misperception can be either good or bad.

This essay provided some tools for the policy-maker to identify misperceptionbased bundling and to ascertain when such bundling is welfare reducing. It then considered various regulatory responses and unbundling policies. The difficulty in identifying the motivation (or motivations) for an observed bundle, coupled with the difficulty in evaluating the welfare implications of bundling even when its underlying motivation is revealed, suggests regulatory caution. For this reason the most attractive unbundling policies are those that facilitate the smooth operation of markets-through reduced switching costs and the provision of information-rather than the more heavyhanded policies that directly prohibit bundling or attempt to fix the price of the bundle or its components.

Crimes and Constitutions

RACHEL BARKOW examines the disturbing implications of ignoring separation-of-powers concerns in criminal matters.



Just when our nation is debating the limits of executive power in a time of war, Rachel Barkow looks at the separation of powers from a unique angle, that of criminal law. Her paper "Separation of Powers and the Criminal Law" was published in the Stanford Law Review (58 Stan. L. Rev. 989 (2006)) and won the AALS Section on Criminal Justice's Outstanding Paper Competition 2006. In this summarized excerpt, Barkow argues that we should pay more attention to maintaining a strict separation of powers in criminal matters because no other structural or procedural checks provide the same protection.

t is a familiar premise that the Constitution separates legislative, executive and judicial power to prevent tyranny and protect liberty. By preventing any one branch from accumulating too much authority, the separation of powers aims "not to promote efficiency but to preclude the exercise of arbitrary power." The price of separation is that it makes it more difficult for the federal government to act—whether for good or bad purposes.

The rise of the administrative state put a spotlight on this cost of the separation of powers. New Dealers in favor of a more efficient and active federal government argued for a relaxation of the division of powers to allow agencies to combine government functions in order to address social and economic ills. Instead of relying on separated powers as the primary means of protection against government abuse, they proposed other checks on state power. For example, the Administrative Procedure Act (APA) requirements of notice and comment, of separation between law enforcers and adjudicators, and of judicial review were designed to perform the same functions as the Constitution's separation of powers safeguards, but without hamstringing the government's ability to respond rapidly to the nation's problems.

The Supreme Court has accepted this compromise for administrative agencies. While the Court has rejected some institutional arrangements that strayed too far from the constitutional separation of powers, it has allowed considerable blending of executive, judicial and legislative power in regulatory agencies. At the same time, the Court has taken an expansive reading of the APA to check government abuse.

Scholars have filled volumes analyzing the relationship between the separation of powers and the administrative state. Some have argued that the Court's allowance of blending promotes good government and accords with the Constitution. Others have claimed that the existing administrative state flouts the basic structure of the Constitution and that the Court has been too permissive of government schemes that combine powers.

What has been overlooked in both the literature and the Supreme Court's decisions is what the separation of powers requires when the government proceeds in a criminal action. Criminal cases could be viewed in one of three ways. One approach would be to treat separation of powers questions in criminal cases no differently than they are treated in administrative law cases. As in the administrative law context, some blending of powers would be permitted to allow the federal government to respond more readily to criminal matters, while at the same time, other checks would take the place of the constitutional separation of powers to ensure that the government does not abuse its power. A second alternative would be to distinguish criminal matters from administrative ones. Because state power is at its apex in the criminal context and the consequences of abuse are so high-an individual could lose his or her liberty or even life-this view would require strict adherence to separation of powers to make sure that the state acts appropriately against an individual. Current law follows a third way. Criminal cases are not distinguished from administrative law cases, so the separation of powers is often relaxed to allow a blending of powers when the government claims it is necessary in the name of expediency. Indeed, the Court has been even more permissive in the criminal context than it has in cases involving nonpenal laws. But unlike the administrative law context, where agencies must adhere to the structural and process protections of the APA and their decisions are subject to judicial review, the government faces almost no institutional checks when it proceeds in criminal matters. The only safeguards come from the individual-rights provisions of the Constitution, but those checks act as poor safeguards against structural abuses and inequities.

The current arrangement therefore takes the worst possible approach to separation of powers in the criminal law. The protection provided by the separation of powers is relaxed, but nothing takes its place. As a result, the potential for government abuse is, ironically, higher in the criminal context than in other regulatory spheres.

This perverse state of affairs has been overlooked in the literature because scholars have failed to treat criminal law as a separate category for analysis. Instead, questions involving the oversight of the administrative and regulatory state have tended to dominate the discussion of separation of powers. So, the conventional wisdom has been that whatever theory works for the administrative state should work for anything else too. And because most scholars have supported a flexible or functional approach that allows the concentration of different powers in one actor in the regulatory sphere, they have failed to see a problem with that same approach when it is applied to criminal matters.

This article breaks from that tradition and argues that the existing approach to separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design. Although the administrative state has structural and process protections that can justify some flexibility in the separation of powers, those checks are absent in the criminal context. And in their absence, it is critically important to maintain a strict division of powers. tion of powers recognizes and addresses this threat of discriminatory enforcement. It requires not only that the executive and legislative branches agree to criminalize conduct, but also includes the judiciary as a key check on the political branches. Before anyone can be convicted, he or she is entitled to judicial process. Federal judges, with life tenure and salary protections, have the independence that enables them to check both the legislature and the executive and to assure fair and impartial decisionmaking in a given case.

Even these protections were inadequate to the Framers, however. Because separation of powers is concerned, among other things, with conflicts of interest, judges were

The current arrangement therefore takes the worst possible approach to separation of powers in the criminal law. The protection provided by the separation of powers is relaxed, but nothing takes its place.

This approach would lead to different outcomes in the Court's major separation of powers cases dealing with criminal matters and would result in a rethinking of its acceptance of unreviewable prosecutorial discretion over charging and plea bargaining.

O ne of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers. Even before the adoption of the Bill of Rights, the Constitution provided protection for the rights of those accused of crimes through its structural provisions.

Article I establishes express limits on the legislative exercise of judicial power. It prohibits bills of attainder, which would allow Congress to identify those specific individuals affected by any given piece of legislation before passing it. It also aims to prevent the legislature's ability to target individuals for criminal punishment through the prohibition on ex post facto laws. And it limits Congress's authority to suspend the writ of habeas corpus, which is a key protection for individuals against unlawful detention. These provisions expressly deal with legislative interference with the judicial function, but what if the legislature works with the executive to single out disfavored minorities for prosecution? That is, suppose the laws are generally applicable, but they are enforced only against unpopular groups or political enemies of the party in power. The separanot deemed sufficient protection against the possibility of state abuse in criminal cases because of their potential partiality toward the government. The Constitution therefore provides in Article III—the article establishing the judicial role in government—that the trial of all crimes must be by jury. The jury's unreviewable power to acquit gives it the ability to check both the legislative and executive branches.

Added to these many protections are the numerous protections for criminal defendants in the Bill of Rights.

Thus, when it comes to criminal justice, the separation of powers is divined not just from the fact that Articles I, II and III separate legislative, executive and judicial power. Rather, there are many additional textual indications that separating functions is critically important when the federal government uses its criminal powers. Under the scheme established by the Constitution, each branch must agree before criminal power can be exercised against an individual. Congress must criminalize the conduct, the executive must decide to prosecute and the judiciary (judges and juries) must agree to convict.

The Constitution's provisions addressing crime and the separation of powers reflect the fact that the Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime. It could be argued, however, that the extent of federal criminal law expansion, like the extent of the growth of the administrative state, was unexpected. But even if it could be shown that, as in the context of the administrative state, there has developed over time a greater need for the federal government to take an active role on crime, it still does not necessarily follow that separation of powers restrictions should be relaxed when it comes to crime. That is because there are critical functional differences between the two settings.

The greatest historical development when it comes to the separation of powers is the rise of the administrative state. That development provides the main rationale for adopting a functional approach to separation of powers questions. In response to the Depression and a government structure that seemingly failed to prevent it, reformers increasingly turned to expert agencies that would combine functions and address important social and economic problems. The underlying idea is that an active, unimpeded government can produce beneficial results for society.

The Court ultimately accepted these arguments and has long allowed administrative agencies to flout the separation of powers by combining executive, legislative and judicial powers. But the courts' acceptance of the administrative state and its blending of powers was conditioned on the availability of judicial review and a host of procedural and structural checks. These checks are absent in the criminal sphere.

gencies conducting formal adjudications must obey various structural **I** rules designed to ensure impartiality. The individual at the agency who presides at the hearing must be impartial and must be separated from individuals at the agency who perform investigative and prosecutorial functions. ALJs and anyone else at the agency involved in the decision-making process are prohibited from having ex parte communications related to the merits of the proceeding, and the agency's decision must be based on the evidence in the record. The APA also imposes various process requirements, including notice to interested parties, an opportunity for interested parties to submit evidence and arguments, and a chance for interested parties to submit proposed findings and to make exceptions to tentative agency decisions. In all formal proceedings-rulemakings and adjudications-the agency must issue a decision on the record with a statement of its findings and conclusions.
When agencies proceed through informal rulemaking instead of formal rulemaking or formal adjudication, they must issue a notice of their proposed rules and give the public an opportunity to comment. As in formal proceedings, the agency's decision must be based on the facts in the record, and the agency must disclose the evidence on which it relied in reaching a decision. The agency must consider the comments received, and explain why it rejected arguments made in the comments.

All agency proceedings-formal or informal, rulemaking or adjudication-are subject to extensive judicial review. Decisions made in even the most informal adjudications are subject to judicial oversight to ensure that the agency's action is not arbitrary and capricious. Agencies must give reasons if they change course from case to case, and there must be support for the agency's decision in the administrative record. If there is evidence in the record that undermines the agency's position or if a party or commenter raises a serious objection to the agency's proposal, the agency must offer reasons why those arguments do not hold sway. Thus, unlike the judicial rubber-stamping associated with rationalbasis review, courts take a "hard look" at the agency's explanation to provide a check against arbitrary implementation.

Oversight laws—such as the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA)—grant the public additional access to information about the agency decision-making process, which provides further protection against arbitrary agency action or agency decisions based on improper influences.

This oversight regime of judicial review and structural constraints has been crucial to the Court's acceptance of broad delegations of legislative and judicial power to executive agencies.

Notably, these protections do not apply to the actions of key governmental officials and agencies exercising criminal power, particularly prosecutors. Because of the operation of a broad federal criminal code and prosecutors' leverage over plea bargaining, the only process-judicial or otherwise-that most defendants receive comes from prosecutors. In the course of reaching a negotiated disposition, the prosecutor effectively acts as an adjudicator who decides what the appropriate punishment for the defendant is. Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation. The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore



"Let me give you a lesson in American history: James Madison never intended the Bill of Rights to protect riffraff like you."

no structural separation of adjudicative and executive power, and defendants have no right to a formal process or internal appeal within the agency. In addition, in the course of bargaining with a defendant over charges, the prosecutor can engage in ex parte contacts with the police and investigators, and the defendant need not be given access to the information on which the prosecutor relies—that is, the prosecutor's evidence of the defendant's guilt.

The Supreme Court is of the view that a prosecutor's charging and plea bargaining decisions are largely off-limits from judicial review. Furthermore, while judges oversee prosecutors to make sure that pleas are knowing and voluntary and have a factual basis, their inquiries are cursory.

Thus, instead of being subject to the hard-look review that other agencies face when they seek to impose fines or penalties or to require action of some kind, prosecutors enjoy a presumption of regularity and face only a cursory judicial inquiry of their discretionary decisions to enter plea agreements. Moreover, though a defendant has the right to reject a plea and take his or her case to trial, that option fails to police structural abuses of power. Indeed, a defendant takes a big gamble in exercising even this limited power of review, because if the defendant is found guilty, he or she is subject to harsher punishment.

Without judicial oversight to speak of or any internal constraints, the potential for arbitrary enforcement is high. Prosecutors need not treat similar cases similarly for purposes of plea bargaining, and they need not explain why they agreed to reach a deal with one defendant but refused to do so with another defendant guilty of the same crime. Indeed, because prosecutors need not make the terms of their plea bargains available to the public through publication and because prosecutorial law enforcement is largely exempt from open government laws like FOIA, a defendant might not even know that another similarly situated defendant received a particular deal. Nor may defendants be aware that a prosecutor is diverging from office policy. Unlike an administrative agency's policies, the prosecutor's policies are not openly disclosed to the public and are not subject to arbitrary and capricious review for reasoned consistency.

Nor is the lack of structural oversight in the federal criminal process limited to prosecutors. Even when Congress created the Sentencing Commission, a federal criminal agency modeled in crucial respects after traditional administrative agencies, it failed to subject the commission to key APA requirements.

There is, then, a sharp incongruity between the treatment of discretion in the administrative context and the criminal context. The Court accepted the constitutionality of the administrative state against the backdrop of structural and procedural protections that protect against the dangers of combining powers under one roof and of allowing one branch of government to exercise disproportionate authority. Because those protections are lacking in the context of criminal matters, the same arguments in favor of flexibility do not apply.

The structural and procedural checks supplied by the APA are not the only mechanisms for checking government abuse that are absent in the criminal context. Political oversight mechanisms provide a key check on administrative agencies, but they do not work as effectively when it comes to criminal enforcement.

In the typical regulatory context, groups line up on both sides of the issue and, if anything, there are more powerful forces operating to check too much government intervention. The political process is more skewed when it comes to crime, particularly federal legislation aimed at substantive crime definition and sentencing. Neither criminal defendants nor judges—the two main targets of criminal punishment legislation have much sway on the political process.

While the targets of regulation are weak, proponents of more expansive criminal laws are not. Prosecutors have an incentive to request broader criminal laws and longer, mandatory sentences because those laws make it easier for them to obtain defendants' cooperation in plea bargaining. Groups with a stake in the expansion of prisons-including rural communities, corrections officer unions and private prison companies-are powerful forces in favor of longer sentences. Victims' rights groups similarly endorse longer sentences and more expansive criminal laws. The public is also generally supportive of harsher criminal laws and is easily mobilized by politicians or interest groups to get behind "tough on crime" initiatives.

Because the targets of regulation are weak and the voices in favor of broader laws and longer punishments are powerful, the political system is biased in favor of more severe punishments. There are few forces that can counter the government when it overreaches on crime.

The scheme of separated powers is designed to do just that. The Constitution makes it difficult for the state to act in criminal cases against individuals and members of groups disfavored by the majority. All three branches must agree to allow a criminal conviction, and the judiciary plays a particularly significant role because of its relative insulation from the political imbalance described above.

The impediments to action provided by the separation of powers check state abuse and preserve the interests of individuals and local and political minorities. This argument for separation of powers is therefore the classic representation reinforcing theory for judicial review. Thus, arguments for dismantling this scheme on the basis of efficiency grounds-that the state is hamstrung in its ability to proceed in criminal cases-disrupt the very core of why we have separation of powers in the first place. The inefficiency associated with the separation of powers serves a valuable function, and, in the context of criminal law, no other mechanism provides a substitute.

DANIEL HULSEBOSCH takes us back to revolutionary America to investigate the unique context that inspired the *Federalist Papers*—and to explain how New York became the Empire State.



How is political authority created and then sustained over time? In Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830 (University of North Carolina Press, 2005), Daniel Hulsebosch examines the imperial context of the Federalist Papers, which he argues failed to rally support for the federal Constitution but soon became its "user's manual." He also explains that the invention of U.S. constitutional law was influenced by British constitutional ideas, boiled down in the dynamic melting pot of the New World. In this excerpt from the book's introduction, Hulsebosch describes colonial New York and the seeds of constitutional law.

etween the British takeover of the place the Dutch called "New Netherland" in 1664 and New York's emergence as the "empire state" in the early nineteenth century, the province was transformed from a modest trading outpost on the edge of the Atlantic world into a bustling entrepôt and exporter of goods, people and culture. New York's most important cultural export in the early years of the American republic may well have been its constitutional culture. Decades of political and legal turmoil generated a new understanding of constitutionalism that New Yorkers published in books that circulated across the new United States and beyond. The institutional matrix for this creativity was empire, and the catalyst was an intra-imperial struggle that culminated in the American Revolution. Afterward, New Yorkers remained central to the reconfiguration of constitutional resources that culminated in a new genre of law, constitutional law, as the province moved from the periphery of Britain's Atlantic empire to the center of a new continental one.

By the middle of the eighteenth century, New Yorkers operated on the edge of a vast ocean marketplace and their province helped connect the British Isles and the West Indies. Commerce linked the colonies and British port cities, and most New Yorkers had no reason to imagine a world without those ties. From this perspective, New York was much like Bristol, its trading partner on the west coast of England: both measured their distance from London by sailing time; only the unit of measurement, weeks versus days, differed. But diversity and specialization engendered conflict among the provinces, such as between the continental colonies and the West Indies. And New York was itself regionally diverse: the city and its dependent hinterland; the Hudson Valley, with its large manors and commercial farming; Albany, a hub for Indian trade; eastern Long Island, a place of farms and fishing villages close in space and identity to New England; scattered western settlements; forts and trading posts even farther west in land still governed, to all intents and purposes, by the Iroquois. Although they were not royal subjects and had no formal representation in the province, the Iroquois made New York different from other crown dominions. On the other hand, New York shared with its neighbors a reliance on slave labor. There was a large slave population in New York City-20 percent of its population in 1740-and a small but significant number of slaves throughout the countryside. They, like the Native Americans, were not members of the colony's political culture, but they too affected its constitution before and after independence. This regional and demographic diversity produced rivalries as well as connections, a sense that New York was a separate jurisdiction, and reminders that it was enmeshed in a larger Empire. The Indians had long observed that the province's main river flowed up through the mountains as well as down to the sea. New Yorkers' perspectives shifted likewise, north and south, east and west, into the continent and across the Atlantic. This oscillation between the local and cosmopolitan defined what it meant to be provincial and generated conflicting constitutional visions among colonial New Yorkers.

New York was both representative and unusual. Colonists elsewhere in the British North America were at least as protective of their local liberties as the provincial elite in New York. Likewise, there were competent imperial officeholders in several of the other colonies. Yet no other colony had as coherent a group of imperial agents as that based in New York after 1750. More important, in no other colony were the provincial elite and the imperial agents so well balanced as in New York during the last quarter century of imperial rule. That tension between a corps of officials trying to reform imperial administration and a provincial elite jealous of its local power, in a marchland colony full of opportunities and threats, made New York's path to revolution indirect and not inevitable.

After the Revolution, New York remained a strategic port and became a headquarters for continental expansion. It was then that people began calling it the "empire state." That nickname probably derives from

George Washington's reference to New York City as "the seat of the empire" in 1785 when he received the golden key to the city, then the Confederation's capital. A seat of empire was geographically central, commercially vibrant and internationally formidable. Rome was the classical model, London its contemporary successor. Washington invoked the prospect of an American empire to urge city residents to resist Antifederalist localism, which he thought threatened "to sap the Constitution of these States" and "destroy our national character." In 1785 it was unclear whether New York would become the seat of an empire, for it was too early to tell whether the Confederation would succeed as one. This was the issue-"the fate of an empire, in many respects, the most interesting in the world"-that Alexander Hamilton framed for New York voters two years later in the first Federalist. New York's unusually rich debate over the federal Constitution reflected its geopolitical importance and tradition of articulate political opposition. In turn, New York's ratification literature helped translate the tropes of imperial and provincial power into American constitutionalism.

he recovery of the imperial origins of American constitutionalism is not only a matter of historical interest. Although legal scholars often declare that American constitutions are living documents that adapt to changing times, even those who eschew reliance on the framers' original intent try to identify historically legitimate restrictions on constitutional meanan exceptional break with the past. They accept the framers' claim to have established Novus Ordo Seclorum at face value rather than ask why the framers wished to distance themselves from some, but not all, legacies of the British Empire-why they wished to see themselves as founders. Returning the Constitution to the context of imperial resistance, rebellion and state constitution-making reminds us that the founders looked backward as well as forward. In both directions they saw empire. While crown officials and parliamentary legislation were gone, the legacies of British rule-its legal institutions, practices and languages-remained as the raw materials for the American constitutions.

Now "empire" has negative connotations. Modern empires are seen as expansive and exploitive. According to the conventional historiography, the United States has, except for an aberrant moment in the late nineteenth century, been free of imperial ambition. Since the Second World War, historians have shifted focus away from even the incontestably imperial aspects of its colonial history. But new interpretive models within the academy and skepticism about nationalism outside it allow us to return to the eighteenth century and recover the imperial strand of American constitutional history. The renaissance of Atlantic history and imperial studies reminds us that the American colonies were much like the other British provinces across the ocean: Each was protective of its autonomy while participating fully in Atlantic trade and culture. Historians have begun to recover the

Substantive notions of liberty traveled well, like negotiable instruments, and became transatlantic currency that could be traded anywhere English was spoken.

ing. Some fundamental meanings were encoded long ago, and each generation must work within or against them. The first American constitutions, state and federal, were drafted after two centuries of colonization in which British legal culture structured relationships between province and metropolis, among provinces and within each province. Consequently, the constitutional ideas and practices of the first British Empire still influence American constitutionalism today.

Most Americans, however, equate the founding with the writing of the federal Constitution and view that event as political, social and economic connections that integrated the Atlantic and the individual empires within it. Constitutional culture was a crucial means of integration. From its beginning, the British Empire could nothave expanded so successfully without the integrating symbols of English constitutional liberty, and constitutionalism would not be so strong a force in the modern United States without that imperial legacy. But the Empire was also marked by legal pluralism and polyvalent authority. Relationships that today appear vertical were then horizontal, as the Empire was a collection of competing power centers rather than a pyramid of sovereignty. Who governed what? The answer turned on who asked whom, when and why. The Empire's legal architecture was baroque but unfinished: ornate in some areas, rude in others. Most adhered to no single theory of the Empire or its constitution; legal integration remained a controversial goal. As the Empire spread, the resources of English constitutionalism became more malleable. What had served integration soon disguised diversity behind familiar terms. The failure to create a unifying constitution—a legal environment that could account for and contain disputes within the Empire—contributed to its disintegration.

Some officials in eighteenth-century New York recognized that a special category of imperial law was necessary to bind the Empire. In a legal world with no imperial or British law superior to the local law of its parts, these officials tried to manufacture one, carving out a space either within the common law tradition or separate from it in which to administer imperial policy. The common law had served this purpose in medieval England, as royal judges centralized justice in toward the crown and away from local customary courts. But although England had become Great Britain, and Great Britain the British Empire, the dominant constitutional resources within those extended territories remained English, particularly the common law. This was now a hybrid resource of institutions and rhetorical strategies plastic enough to bolster central control or defend local autonomy, especially when the common law became closely identified with the "liberties of Englishmen" in the seventeenth century. Overseas, provincial New Yorkers used those components upholding local autonomy successfully, forcing the imperial agents to search for a separate imperial law. But the agents' attempts to create it helped precipitate rebellion, and today they are forgotten. A generation later, American lawyers created constitutional law-a category of law with distinctive procedures, vocabulary, style of reasoning, institutions of enforcement and education, and emotional atmosphere-to bind the states together. In so doing, they succeeded where the British imperial agents had failed and figure prominently among those whom Americans call founding fathers. Other jurists built on this foundation of federal constitutional law to revise state common law and make it more integrative, too. When the founders created a new republic, they did so in dialogue with their own colonial past, forging tighter bonds than the old imperial administrators had even imagined: "a more perfect Union."



"Remember, gentlemen, we aren't here just to draft a constitution. We're here to draft the best damned constitution in the world."

he evolving definition of "constitution" is analyzed throughout my book. For now, it is helpful to think of constitutions not as documents but rather as relationships among jurisdictions and people mediated through highly charged legal terms. Before and after the Revolution, a constitution was a way of thinking about, and practices for carrying out, the project of government and never depended on a single institution of enforcement. Instruments and rules were not enough. Well-understood practices, resting on a shared commitment to the society that the constitutions serve, are needed to make a constitution work. The premise of Anglo-American constitutionalism has always been that constitutions are largely self-enforcing through a mixture of popular acceptance and deft administration. However, constitutional ideas and practices resting on this premise varied across space at any given moment and changed over time. Britons in New York before the Revolution, and Americans after, struggled to define constitutions to accommodate and shape British legal culture as it traveled with colonists abroad. The focus here is on the way people experienced constitutions rather than on constitutional theory. It is futile to classify Anglo-American constitutionalism as, for example, either republican or liberal as historians and political philosophers understand those terms. Most people believed that a constitution should protect both the public interest and individual liberties. Similarly, early modern constitutions were not simply descriptive blueprints for government or lists of prescriptive ideals. A constitution could be either or both, depending on who invoked it and for what purpose. Too much has also been made of

the distinction between unwritten and written constitutions. Much of the English constitution was written. Although no single document captured all English constitutionalism, there was an evolving canon of great documents. Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689), for example, were on everyone's list, while the Levellers' Agreement of the People (1648) was on few. These documents were not exhaustive. Commentary in treatises, essays and judicial reports fleshed out their significance, as did oral tradition. Beyond the documents and the commentary were the institutions that interpreted and applied them, the practical conventions that gave constitutions life. Collectively, these documents, ideas and practices formed the Empire's constitutional culture.

This culture was not sealed off from the rest of Anglo-American culture. Control over it was decentralized; no one held a monopoly on constitutional meaning. There were no constitutional law casebooks or professors of constitutional law. There was no genre of constitutional law. Early modern Englishspeakers also conveyed more than strictly legal meanings when they employed constitutional scripts. Modern Americans sometimes do the same, slipping political visions into well-crafted legal interpretations. Early moderns did so explicitly because the legal had not been divorced from the political. Constitution-talk was a legalist idiom that highlighted arguments not just about courts and legislatures and executives but also the fate of political society. Consequently, constitutional culture provided a primary language for constructing the British Empire, revolting against it and writing the new American constitutions.

Conventional wisdom tells us that the American revolutionaries rejected the principle of legislative supremacy along with parliamentary regulation and carefully distributed authority between local and central governments, now called the doctrine of Federalism. However, if we change the prerevolutionary image of the British Empire, the new Union looks different, too. Instead of dual, limited governments emerging from an omnipotent sovereign, provincial Britons moved from a fluid constitutional environment to a much more structured and constraining one. If "federal" means diffuse authority, government became less federal after the Revolution because there were fewer legitimating ideas and institutions for Americans to draw upon than for Britons a generation earlier. Indeed, the American constitutional doctrine of federalism entailed just this concentration of authority. Centripetal, not centrifugal, forces characterized the Revolution and its constitutional settlement. Soon legitimate constitutional power operated at only two levels: the federal government and the states, with local authority subsumed beneath the latter.

The shift from British constitutionalism to American constitutional law also tended to submerge the political dimension of constitutions. Politics became more clearly separated from law, although the two existed on a continuum. And in the first two generations of the republic, state legislatures enjoyed something very near to supremacy. The first party system, which emerged in the 1820s, represented the high-water mark of state political power. But partisan politics, and the large internal improvement projects party-led states undertook, soon sparked a backlash, and voters demanded new state constitutions to restrain government. Those nineteenth-century state constitutions clarified the line between ordinary politics and constitutional law, but they also showed that constitution-writing remained a special form of politics.

So there was a transformation in constitutionalism in the early United States, but it was not a shift from descriptive to prescriptive constitutions. Instead, Americanization involved the reorganization of the sources of a constitution, new institutions of enforcement and a new conception of law as a hierarchy of substantive genres rather than, as in England, a collection of courts and procedures for resolving disputes, each jostling with the others for preeminence but most arranged horizontally rather than vertically. This new conception of law did not develop directly out of English legal ideas but passed first through a stage that might be called imperialization in which colonial

subjects and governors adapted British legal sources for their purposes. Where before law was defined in terms of jurisdictionwho had the power to determine right and wrong and what were the boundaries of that power?--now it was conceived as jurisprudence, a rational system of rules that bound governments and private parties. The jurisdictional lines that defined the ancient constitution were difficult to police abroad. In contrast, short, powerful statements of fundamental law traveled well across space. For the colonists to claim English liberties, they had to conceive of them as an abstract jurisprudence operative in all of the crown's dominions, not as a system of licenses to sue in territorially bounded courts. Substantive notions of liberty traveled well, like negotiable instruments, and became transatlantic currency that could be traded anywhere English was spoken. This jurisprudence of liberty could be used many ways. It could be imperial and integrative here, provincial and disintegrating there; liberating in one place and enslaving in another-liberating and enslaving in some places at the same time. To understand the legal culture of the old Empire and the early United States, we must understand the intellectual transforand connected white Americans to their British past. But overland migration, which only with nationalist hindsight can be called internal, had always separated British North America from Britain, American constitutional culture from British. That movement, which was a behaviorist expression of radical notions of liberty and property, infuriated the British imperial agents while also making some of them rich from land speculation. Frustration fell away after the Revolution, and mobility became the country's most important capital investment; without it, the Union's greatest resourceland-remained worthless. And without ties of cultural identity, foremost among which was constitutional identity, much of that land might not have become part of the United States. People moved west; their governors called them American; lawmakers incorporated them into the Union; because that incorporation offered the settlers the prospect of equal citizenship, they accepted it. In retrospect it is manifest destiny. At the time it was a speculative project, a kind of political speculation. The hard fact of mobility-of popular disregard for jurisdiction in the traditional sense of legal boundaries of both liberty and power-was a fundamental

Constitutional law became an integrating force far stronger than any under the British Empire.

mation in the idea of law on which colonial resistance was premised: the shift from jurisdiction to jurisprudence, the rules in a legal system to the rule of law, English liberties to American liberty. The centerpiece of this transformation was the creation of the new, separate category of constitutional law, which was an integrating force far stronger than any under the old Empire. The fundamental legal tension of empire was between the rule of law and the expansion of rule, a striving toward universals of government and rights on the one hand and toward increasing territorial jurisdiction on the other. The American founders' resolution was to attempt to control a space by law that could not possibly be controlled by men.

The expansive space could not be controlled by traditional means because the people moving across it would not submit to such control. This relentless mobility was the paramount expression of popular sovereignty in America, and it expressed more than traditional "customs in common." Popular constitutionalism, which was performed in petitions, protests, parades and mobbing, continued after the Revolution fact of early American constitutionalism. It contributed to the Revolution, and it shaped all the American constitutions. The states existed in a market for people that turned on legal incentives called rights and liberties, and the federal government struggled to maintain the perception, true in most places at most times but fictional in all once in a while, that it exercised authority over all the people. Here was the radical potential of "we the people." The relentless mobility of the people proved as momentous as their increasing participation in the electorate and occasional performances of their power in parades and mobs. The people went where they were told not to go and encountered Native Americans unschooled in the legitimating language of Anglo-American liberty. They conquered the continent less with violence than with the confidence with which they carried forward notions of constitutional liberty forged in the matrix of empire. That, too, is what was meant by a government of laws rather than of men.

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Saving Fish by Privatizing Marine Fisheries

KATRINA WYMAN argues that politics has impeded economic forces, leading to devastation in the world's oceans.

Why haven't ITQs-individual transferable quotas-caught on in the global fishing industry? They would seem to be the answer to overfishing and the dwindling of marine fisheries worldwide. That is a question that drew Professor Katrina Wyman to write "From Fur to Fish: Reconsidering the Evolution of Private Property," which was published in the New York University Law Review (April 2005). In it she examines predominant economic theories of property rights formation, analyzes actual examples and, finally, focuses on politics as an actor that plays a much more important role than economic hypotheses consider. The following is a summary of her paper.

ne of the first questions that property law professors often ask their students is why they think that private property exists. For many years, many legal academics influenced by the work of economist Harold Demsetz have given roughly the same answer to that question: We have private property because we've implicitly made a decision that the benefits of private property are greater than the costs of establishing it. To illustrate the point, legal academics often invoke an example from anthropology that Demsetz helped to make famous.

In the eighteenth century, beaver fur hats became fashionable in European capitals like London. Making these hats obviously required beaver fur, which fur traders increasingly started buying from indigenous peoples in North America, including peoples who lived in parts of modern-day Quebec and Labrador. According to some anthropologists, in the eighteenth century, the growing European demand for beaver fur induced the indigenous peoples who were supplying it to adopt a property regime for managing beaver. Before they encountered the fur traders, indigenous peoples in Quebec and Labrador apparently didn't have a regime for allocating beaver among themselves-beaver hunters reportedly competed for beaver throughout the territory in which they hunted. As beavers became a more valuable commodity, though, indigenous peoples in the area saw

the benefits of mapping out hunting territories, in which only family members could hunt for beaver. For example, hunting territories would allow hunters to hunt at a more leisurely pace, because they would not have to compete with other hunters. In addition, the families who controlled territories would have an incentive to husband the beaver because they would know that if they did not shoot beaver on their own territory this year, the beaver would be available next year when the price might be higher. In short, as the standard economic theory about why we have property predicts, the rise in the value of the beaver due to the fur trade prompted the creation of a property regime to govern the allocation of the beaver.

In "From Fur to Fish," I argue that the standard economic explanation for why we have private property neglects the pervasive role that governments now play in creating private property. We need to build on existing scholarship to reframe the standard stories that we tell about why private property exists to take seriously the role that governments play in establishing private property in the modern world. We don't live in the stateless world of the eighteenth-century beaver hunters. In fact, their modernday descendants in northern Quebec and Labrador don't either-they're regulated by several levels of government. Focusing too narrowly on the role of economic factors means that we have an incomplete picture of why we have private property. In addition, it leaves us without a good understanding of why efforts to introduce private property in situations where it would be helpful have stalled. To make progress in implementing private property in areas of the world where it is needed to promote economic development, or avoid environmental degradation, we need to deepen our understanding of how private property develops.

"From Fur to Fish" is divided into two parts. The first part discusses in largely theoretical terms what it means to take seriously the role of politics in property rights formation. The second part uses the theoretical apparatus set out in the first to explain a contemporary paradox: the failure to establish private property rights in many marine fisheries notwithstanding the rapid depletion of these fisheries in the past few decades. The signs that marine fisheries are dwindling are everywhere: Some fish that commonly used to appear on grocery store shelves or restaurant menus are now hard to buy at all, or very costly. Grocery stores and restaurants are now much more likely to be selling farmed fish, like Atlantic salmon, than they were 20 years ago, as wild fish have vanished. Environmental groups sometimes pressure chefs not to stock certain endangered fish, like Chilean sea bass. They also attempt to discourage consum-







"My father had a saying: 'If you sell a man a fish, you'll make a good living; if you teach a man to fish, you're stupid.""

ers from buying fish whose populations are dwindling by circulating pocket-size "fish lists" that identify fish that consumers should feel free to enjoy without guilt, as well as fish that they should avoid. According to the standard explanation of why private property evolves, this growing scarcity ought to have induced us to develop private property rights in marine fisheries to stave off the depletion. But except in a few cases, private property arrangements have not developed in marine fisheries. The key to understanding this is appreciating the role that politics plays in the formation of private property. Once we better understand how politics gets in the way, we can think of ways of containing the influence of politics that might help us move more quickly to address the depletion of ocean fisheries-and many other environmental and economic problems at home and abroad.

The standard economic explanation for private property implicitly suggests that private property is created from the bottom up, by private actors who negotiate private property arrangements. Recognizing the role of the state in the formation of private property means moving away from the idea that private property is the product of bottom-up contracting between private parties. Governments do not act through contracts—they act top-down, through much more complicated decision-making processes, which, unlike contracting, do not require unanimity.

Working largely within the standard economic framework for understanding private property, legal academics and economists have pointed to a number of factors as influencing whether private property will develop. I identify five hypotheses about why private property evolves—or does not—after reviewing the literature on the evolution of private property. In my paper I then show how each of these five hypotheses is affected by factoring in the role of governments in creating private property, and moving away from the idea that private property is created from the bottom up by individuals through private contracts.

Consider, for instance, one popular hypothesis that is embedded in the famous example that indigenous peoples developed hunting territories in response to the fur trade. According to the "increase But once we recognize the state's role in the process of forming property rights, an increase in the price of a good becomes a much weaker predictor of the likelihood that private property will be created. That is because the political process through which private property increasingly is created is at least as sensitive to the distribution of profits from the higher prices as to the aggregate level of benefits from the higher prices. Imagine a new private property arrangement that promises sizable benefits for the group as a whole, such as an increase in the overall population of beavers that could be sold. The new arrangement nonetheless might not be implemented if the aggregate benefits would be spread thinly among numerous persons who individually would need to work hard at their own expense to implement the arrangement.

My case study of marine fisheries emphasizes why we need to rethink the standard economic explanation of why private property evolves in light of the role that the state plays in creating property rights and how we should go about reconceiving the standard economic hypotheses.

For the past 60 years, the world's oceans have been the subject of an enclosure movement. This enclosure movement has progressed in a series of waves, much like the better-known enclosure of English common lands between the fifteenth and nineteenth centuries. In the first wave, countries began claiming national property rights over ever-larger expanses of the oceans, including marine fisheries, after the end of the Second World War. Then countries

The slow progress in implementing ITQs to address the problems in marine fisheries is a classic instance of politics getting in the way of the introduction of private property rights.

in the price" hypothesis, private property rights develop after the price of a good rises, because individuals are more interested in securing access to higher-priced goods. For example, scholars recounting the development of the hunting territories tend to suggest that the increased demand for beaver furs raised the price that fur traders paid indigenous peoples for beaver furs. In turn, indigenous peoples are said to have negotiated the creation of hunting territories among themselves as the rise in the price of beaver furs made it more desirable to secure access to stable supplies of beavers. began subdividing national property rights in fisheries domestically into smaller-scale communal regimes in a second wave of enclosures. For over 30 years, economists and others have been advocating a third wave of enclosure through the creation of a form of private property rights, often called individual transferable quotas (ITQs). But to date, ITQs have not been implemented in many marine fisheries.

ITQs are similar to other propertybased ideas for managing environmental resources, such as the marketable pollution permits that the U.S. implemented in 1995 to reduce acid rain, and the transferable development rights that cities such as New York use to regulate use of air space. The first step in implementing an ITQ program is to cap the amount of a fish species that can be harvested from a particular area. For example, a regulatory agency might begin by stating that only 100 tons of flounder could be fished in a given year from a particular area in the Atlantic Ocean. The second step is to allocate rights adding up to this cap among fishers. Fishers then are allowed to trade these rights, to permit the more efficient fishers to buy rights from other fishers to capture more fish. The introduction of ITQs is a significant event in a fishery. Unlike other regimes for managing fisheries, ITQs give fishers entitlements to specific shares of the fish. As a result, fishers begin the season knowing that they are entitled to harvest a portion of the fishery, and don't have to race each other to capture as much of the fish in the sea as they can before the fishing season is over. Ending the competition between fishers that afflicts many fisheries has a number of benefits. For example, it means fishers have less incentive to invest in fancy boats and fishing technology, and consequently less need to press regulators to increase the amount of fish that can be caught each year to pay offloans to buy additional equipment. Lowering the pressure on the resource in turn may give depleted fish populations time to recover. Also, ending the competition out on the water may make fishing a safer job. In places like Alaska, fishing is notoriously dangerous, because fishermen go out on the choppy seas in all kinds of weather. When fishermen have guaranteed rights to shares of the allowable harvest, they are more likely to play it safe, and stay home when the weather is bad because they know that the fish still will be there for them to catch on the next day that the weather is better.

Given the severe depletion of many marine fisheries, and the benefits of ITQs, the standard economic theory about when private property rights develop suggests that ITQs should be widespread in marine fisheries. But relatively few U.S. marine fisheries are governed by ITQs. Indeed, the United States surprisingly has historically lagged behind its northern Canadian neighbor in implementing ITQs, even though the two countries share many marine fisheries, and Canada usually is viewed as more resistant to property and marketlike mechanisms for addressing a range of public policy problems, from pollution to health care.

The slow progress in implementing ITQs to address the problems in marine fisheries is a classic instance of politics getting

in the way of the introduction of private property rights. The cumbersome decision-making process is a significant deterrent to implementing ITQs in the United States. For instance, implementing ITQs in most marine fisheries usually requires getting the agreement of what are known as regional fishery management councils. These councils were established in 1976, when Congress extended U.S. jurisdiction over marine fisheries out to 200 miles from shore. The councils are made up mostly of representatives of commercial and recreational fishing interests, such as fishermen, processors and charter boat operators. The result is that ITQ programs usually cannot succeed without the agreement of many of the powerful players in the fisheries involved. Furthermore, even if a council gives its go-ahead, any interests who object to ITQs can appeal to members of Congress, the courts and the federal Secretary of Commerce, who also must approve the establishment of ITQs. Notably, in the past decade, federal senators from coastal states such as Alaska's Senator Ted Stevens-the most powerful person in U.S. fisherieshave shown themselves willing to interfere with council decision-making to placate local fishing interests.

Of course, the cumbersome decisionmaking structure for introducing ITQs is not the only reason why they have been slow to be implemented in U.S. fisheries. That is because the mere existence of a cumbersome process does not explain why it has been used to delay change. It is easier to get a handle on the reasons why the process is used in this way if we think of property rights formation as a political exercise. For example, one reason that the decisionmaking process has been used to delay the implementation of ITOs is that establishing ITQs involves allocating wealth among different interest groups. In particular, before an ITQ program can be introduced, it's necessary to distribute rights among different groups of fishers who necessarily want to maximize their own share of the rights allocated up front.

These days it seems like we're surrounded by debates about whether to establish or rearrange property rights. We discuss whether to establish property rights in greenhouse gas emissions in order to address global warming. We consider how copyright law should be defined in light of the digital revolution. We contemplate changing the rights of patent-holders to facilitate innovation. While the standard economic theories of property rights yield rich insights, we cannot fully appreciate these debates about property until we recognize that property rights fundamentally are a creation of governments, and not just the product of economic forces.

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By the full-time, visiting, global and library faculty January 1, 2005 through December 31, 2005. (Short pieces have been omitted.)

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The Derrick Bell Reader

Edited by Richard Delgado and Jean Stefancic (New York University Press)

For more than four decades Derrick Bell's provocative and penetrating writings have shed light on issues of race and class. In The Derrick Bell Reader, coeditors Richard Delgado and Jean Stefancic have assembled a sweeping cross section of Bell's work published between 1972 and 2004. This collection, culled from more than 100 articles and 10 books, features essays, poetry and allegories, as well as Bell's now-famous 1990 resignation letter from Harvard Law School in which he decried the absence of a woman of color among the tenured faculty (a situation that remained the case until Lani Guinier joined the faculty in 1998). Organized into 15 themed chapters, the book covers black nationalism, affirmative action, race and class, historical revisionism, academic politics and ethical lawyering. Bell is "a celebrated maverick" whose "work is among the most frequently cited within the legal academy-a significant accomplishment given the iconoclastic positions he often embraces," says Guinier, the Bennett Boskey Professor of Law at Harvard Law School. "The Derrick Bell Reader reminds us that Bell traverses the world of ideas with a practitioner's know-how, a lawyer's aptitude for controversy, a professor's appreciation of rigor, a rock solid integrity, a dedication to speaking truth as he sees it and an abiding passion for justice."

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Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context

By Oscar G. Chase (New York University Press)

The relationships among systems of law and the specific social, cultural and political contexts in which they develop are the subject of this new book by Oscar Chase, the Russell D. Niles Professor of Law and codirector of the Dwight D. Opperman Institute of Judicial Administration. Drawing on comparative legal scholarship and the classic ethnography of Evans-Pritchard, Chase argues that culture deeply impacts the way in which legal disputes are resolved and that a society's processes of dispute settlement are grounded in its assumptions and its established ways of life. Armed with this insight, he explores the details and ramifications of modern American civil procedure. "The result," says David Garland, the Arthur T. Vanderbilt Professor of Law as well as a professor of sociology, "is a cultural analysis of law that adds an important new dimension to our understanding of litigation, legal process and the rules of evidence-as well as a new depth of legal engagement for social theories of culture and ritual. This is a delightful book that brings together the theory of cultural analysis with the practice of civil procedure and, in the process, transforms our understanding of both."



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Justice in Robes By Ronald Dworkin (Belknap Press)

In this new collection of essays, renowned philosopher Ronald Dworkin, the Frank Henry Sommer Professor of Law, explicates his position that morality and law are-and should be-inextricably bound together. As he makes his case, Dworkin deconstructs competing schools of thought such as legal positivism, pragmatism, value pluralism and constitutional originalism, and takes on other theorists such as Richard Posner, Cass Sunstein, Isaiah Berlin and Antonin Scalia. Dworkin holds nothing back. He argues that Posner's "form of pragmatism comes to nothing"; that "Sunstein's counsel of judicial abstinence, if it were feasible at all, would produce not more democracy but the paralysis of a process essential to democracy"; that Berlin's arguments about value pluralism involve a "very broad claim" that his writings do not sustain; and that "Scalia wants to be seen to embrace fidelity I to the text of the Constitution], but he ends by rejecting it."

Nicos Stavropoulos, the University Lecturer in Legal Theory at the University of Oxford, says that *Justice in Robes* is "brimming with philosophical imagination and political insight. It displays Dworkin's unusual facility in discussing profound matters in non-technical, lucid and elegant prose." *Publishers Weekly* agrees, saying: "This is a serious, difficult book that succeeds in explaining what Dworkin believes, what the other theorists argue, and why it matters who is right."

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Mobsters, Unions, and Feds: The Mafia and the American Labor Movement By James B. Jacobs

(New York University Press)

In his 15th book, James Jacobs, the director of the NYU School of Law's Center for Research in Crime and Justice, and Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, focuses on the relationship between organized crime and organized labor, arguing that the Mob's infiltration of unions has adversely affected the entire U.S. labor movement. How did this "illicit marriage" between the Mafia and labor come to be? According to Jacobs, the violent confrontations between employees and employers in the first decades of the 20th century, a period in which many labor unions were struggling to gain a foothold, provided a perfect atmosphere for professional criminals to offer their brutal services and gain disproportionate union influence in the process. The government turned a blind eve to this relationship for years, until the disappearance of Jimmy Hoffa made the issue front page fodder. Publishers Weekly calls Jacobs's examination of the relatively recent use of the RICO law to bring dirty unions under the control of a federally appointed independent trustee "especially valuable." Jeremy Travis '82, the president of John Jay College of Criminal Justice at the City University of New York and former director of the National Institute of Justice, goes one step further, saying that Mobsters, Unions, and Feds is "a wake-up call, an encouragement to the academic community to pay attention to the overlap between politics, organized crime and the labor movement and how the intertwining of those sectors has profoundly influenced the direction of each."



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The Case for Gay Rights: From *Bowers* to *Lawrence* and Beyond

By David A.J. Richards (University Press of Kansas)

"America is in transition between patriarchal and democratic culture, and gay rights is at the cutting edge of this transition, showing how far we have come and how far we have yet to go," writes David A. J. Richards in the preface to *The Case for Gay Rights:* From Bowers to Lawrence and Beyond. Richards, the Edwin D. Webb Professor of Law and a prominent constitutional scholar, examines the history and evolution of the gay rights movement, showing how the early movement was facilitated by liberalism and by growing judicial recognition of the constitutional rights of minorities and women after World War II. He goes on to critique Supreme Court cases from the past two decades that have proved crucial to the evolution of gay rights, including Bowers v. Hardwick, Romer v. Evans and Lawrence v. Texas, and covers topics such as a constitutional right to privacy, samesex marriage and psychology. Richards, the author of 2004's Disarming Manhood: The Roots of Ethical Resistance, also details his own struggle as a gav man. hoping that "structuring my argument as a mapping of personal and constitutional law history will bring alive to the reader the roles that developments in constitutional law play in the lives of Americans." According to the Law and Politics Book Review, he "argues persuasively" and succeeds.

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Rethinking the Patriot Act: Keeping America Safe and Free

By Stephen J. Schulhofer (Century Foundation Press)

Three years after The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11, Stephen Schulhofer returns to the topic of the government's response to 9/11, this time zeroing in on the much-debated legislative package of antiterrorism measures. In Rethinking the Patriot Act: Keeping America Safe and Free, Schulhofer discusses domestic surveillance needs, foreign intelligence searches and surveillance, government access to confidential records and conventional law enforcement's expanded powers. As he analyzes each, he is careful to lay out both the pros and the cons of the Patriot Act. "Whatever its defects," he writes, "it is more complex and more protective of basic liberty than many of its detractors acknowledge. The flaws, however, are basic. They threaten fundamental liberties, needlessly expand dangerous powers and in practice interfere with effective measures to thwart terrorism. We can and must do better." Stephen Holmes, the Walter E. Meyer Professor of Law and a faculty codirector of the Center on Law and Security, praises the book's "comprehensive analysis" and its "conscientious fairness" in "show[ing] how many of the common criticisms of the Patriot Act are specious." That evenhandedness only makes the author's examination of the act's shortcomings "all the more lethal," says Holmes, as Schulhofer "focuses relentlessly on the act's serious flaws."

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Student Spotlight

ON HIGHER GROUND: Dozens of students from law schools all over the country spent their spring breaks on the Gulf Coast pitching in to rebuild neighborhoods and provide legal services to victims of Hurricane Katrina. This group, made up mostly of NYU School of Law students, was taking a welcome break from the hazardous task of demolishing damaged and unstable homes in the now-ironically named Elysian Fields neighborhood of northeast New Orleans.



LL.M. students, from left, Fan Wei, Kun Fan, Taotao Ling and Bin Hu, opened the door to Chinese case law.

Transforming Characters to the Letters of the Law

YU students interested in international law have flown to the farthest corners of the earth to do important work. But last spring five LL.M. 'o6 students from China had to walk only a few blocks east of campus to perform a legal task of global significance: translating international case law from Chinese into English.

The five students-Kun Fan, Bin Hu, Taotao Ling, Jun Wang and Fan Wei, who all took Vice Dean Clayton Gillette's domestic and international sales law class-donated their time to Pace University Law School to translate arbitration opinions issued by the China International Economic and Trade Association Commission. "Having translated decisions from major trading nations such as China is essential to a uniform application of the United Nations' Convention on Contracts for the International Sale of Goods (CISG)," says Gillette, the Max E. Greenberg Professor of Contract Law. "They'll be used by practitioners and academics around the globe."

The students' work is part of an expansive, shared online database of international case law from the CISG. Nations responsible for more than 75 percent of the world's commerce, 67 countries in total, have adopted this standardized legal treaty since its inception in 1980. The CISG promotes equity through the regulation of sales contracts between international entities.

"Voltaire complained that he had to change laws as often as horses when traveling across Europe," says Pace law professor Albert Kritzer, who started building the database in 2004. "Uniform accessibility of the CISG, including the interpretations in decisions on disputes, is the 'more' that is needed. The database is the tool that provides this accessibility."

The current database contains more than 1,700 arbitration cases that have been translated into English. Translations include CISG cases from Germany, Russia, Belgium, Austria and Spain, among other nations.

The students spent 12 to 20 hours per week translating two 10-page cases every month. Thanks to their work, the database is currently the most complete resource of Chinese interpretations of the CISG, with China likely to be the country reporting the most cases when completed.

Though the students worked without pay, they were rewarded in other ways. "After my first translation was put on the site," says Hu, "one of Professor Kritzer's students quoted it in her thesis. I was thrilled."

A Sunny Job Forecast for LL.M.s

L.M.s. looking for employment this year had lots to smile about. Based on attendance and other statistics culled from the 20th annual International Student Interview Program last January, job-seeking international law students have more opportunities, and in a greater variety of cities worldwide, than ever before.

Hosted by the Office of Career Services, 700-plus LL.M. candidates from 30 law schools converged on campus to interview for internships and permanent employment with 110 law firms in the U.S. and abroad. Twenty-two of the organizations were recruiting at NYU for the very first time-a 25-percent increase-for locations that Assistant Dean of Career Services Irene Dorzback had never accommodated at this event before. "Asia, Latin America and Europe are always well represented," she said. But legal opportunities at the fair also included such far-flung locales as Bosnia-Herzegovina, Bulgaria, Croatia, Saudi Arabia, Slovakia, Slovenia and Vietnam-32 countries in all.

Other positive signs: There were 100 more interviewers this year than last, an indication that employers sent more representatives than in the past. There were also a remarkable number of firms whose representatives were recruiting graduates for multiple global sites within their organizations. For instance, Dallas-based Thompson & Knight was interviewing for offices in Algeria, Brazil and Mexico. One can forgive Dorzback for boasting, "For globally focused law firms, this is the best way to interview LL.M.s."



A GREAT JOB: Assistant Dean Irene Dorzback presented recruiters with framed photographs to commemorate 20 years of the international job fair.



Christopher Black 1974–2005

ast September, the NYU School of Law family suffered a tremendous loss when Christopher Black, a promising third-year student, died unexpectedly at the age of 30.

One of the top students in his class, Chris received a full dean's scholarship to attend the Law School, and made his mark as a staff editor on the *NYU Journal of Law and Liberty*.

During a memorial service for him at NYU, Visiting Professor Ehud Kamar, who taught Chris in Corporations, remarked, "Chris was one of those people you immediately notice and immediately remember." There was a certain ease to his academic skill, Kamar noted, and an innate confidence in his questions and answers.

Professor Jack Slain recalled Chris's grinning face from the upper right-hand row of the classroom where he taught Survey of Securities Regulation. Chris, he said, was always ready to make his point.

Chris graduated from Bard College, from which he received a B.A. in history, and was a corecipient of the Marc Block Prize for best senior project in the history department. Marilyn Bernard, a close friend from Bard, said that Chris wasn't always serious: she cherishes the time they spent together watching *Star Trek* reruns or listening to Barry Manilow songs late at night. Chris even taught Bernard to do the Hustle at a party, early in their friendship. The memories will clearly fortify those directly impacted by Chris's death. "Being around him made you want to smile," she said. "Everyone felt brilliant around Chris."

A Tale of Two Parties

n a typically frosty Wednesday in early March, students in Professor Samuel Issacharoff's Law of Democracy class knew they were in for something special.

On the morning's agenda was an informal yet dynamic discussion between Robert Bauer and Benjamin Ginsberg, principal lawyers for the Democratic and Republican parties respectively, each with a distinct perspective on the complicated nature of the American election process.

On hand to provide further analysis were Sudler Family Professor of Constitutional Law Richard Pildes and University of Minnesota law professor Guy–Uriel Charles.

"These are the people who have shaped the way that politics is done in the United States—for better or worse," said Issacharoff, the Bonnie and Richard Reiss Professor of Constitutional Law, as he introduced Bauer and Ginsberg. "Both play a critical role in the way our political system functions." Issues such as redistricting, voter exclusion and campaign finance reform came to life in the firsthand stories and anecdotes of these two Beltway insiders.

"My name is Ben, and I'm a Republican," joked Ginsberg before launching into a discussion of the logistical problems at the polls that have plagued both parties—from the recurrent stuffing of ballot boxes to the controversial 2000 and 2004 presidential elections. When it comes to contemporary elections, the Democrats, Ginsberg said, are the con artists and the Republicans are the thieves.

Redistricting was another hot button topic. Ginsberg contended that redrawing geographical boundaries is necessary to change political bases, describing incumbents, with their 98 percent reelection rate, as wallowing in inefficiency, apathy and corruption. "Redistricting," he said, "is an area of raw human emotion for the elected officials." Bauer agreed on the emotional nature of redistricting, but questioned the process by which seats are reallocated. "One of the peculiar pathologies of the United States is that we allow politically self-interested actors to have various powers over the democratic system—like the design of election districts—that virtually no other democracy does," Pildes chimed in.

Bauer also focused on low voter turnout and a general sense of public disengagement as problems for both parties. He noted that in recent years Democrats and Republicans have each crept closer to the other's ideologies in order to gain votes. This is why, said Bauer, radical ideology is becoming the trump card that might decide an election.

On campaign finance reform, Ginsberg and Bauer concurred that legislative restrictions have led to the creation of special interest groups that wage their own election ad campaigns.

"What you get is less branding by the parties," said Ginsberg, pointing to groups such as the Swift Boat Veterans for Truth (for whom Ginsberg served as counsel), which mounted sharply worded partisan attacks during the last presidential election season.

"Where is the boundary?" Bauer asked, wondering if the increasing visibility and influence of special interest groups was in part due to dissatisfaction with the recent crop of candidates and their lack of focus on issues most important to voters.

In the end, the speakers were more hopeful than cynical about the future, while acknowledging the mistakes of the recent past. Ginsberg said that the disenchanting legal battles that follow "flawed elections" are fought in order to alleviate voters' fears and hopefully bring them out to the polls.



RED AND BLUE MAKE VIOLET: From left, Professor Guy-Uriel Charles, Professor Richard Pildes, Democratic Party lawyer Robert Bauer, Professor Samuel Issacharoff and Republican Party lawyer Benjamin Ginsberg.



Rajeev Goyal, seated third from right, near the Namje high school where he taught as a Peace Corps volunteer. He and his Nepalese friends in the Dhankatu district are celebrating the installation of new water spigots.

A Peace Corps Volunteer Stays **Close to the Lives He Changed**

ajeev Goyal 'o6 is living proof that one person can make a difference. As a Peace Corps volunteer assigned to teach English in eastern Nepal, he was facing a roomful of empty desks each day. Why? The children were spending hours walking to and from the nearest river to procure water for their families.

Goyal decided something had to be done so that the villagers could both have accessible water and allow the kids to get an education. "When I got to Namje, in the Dhankatu district, it was the driest part of the season," he says. "People called the place 'a fish out of water.' It was a two-hour walk from the village to the river, and the children had to fetch water every morning."

Goyal arranged a community meeting to propose the creation of a pump system-not that he knew the first thing about engineering a water supply. "I was hesitant at first because it was a part of the culture and the economy to fetch water. I didn't want to disturb that," says Goyal, who also thought his outsider status as an Indian-American might be an obstacle. "But the villagers basically said, 'If you organize the infrastructure, we'll build it."

And that's exactly what happened. For 16 months, Goyal, in addition to teaching, helped carry pipes and 25-pound bags of concrete through mountainous terrain. He contributed more than sweat equity, too, raising \$30,000 through grants and private donations. Though he hadn't vet attended a minute of law school, Goyal also had the foresight to draft bylaws to govern the new system, guaranteeing jobs for those displaced by its construction.

On July 21, 2003, water trickled for the first time from 22 public spigots around the district. Daily rhythms in the village changed dramatically as a result.

The project changed Goyal's ideas about his own goals, too. During the year, he had been accepted to the Law School but now he wasn't so sure about leaving the village that had become like a second home. A discussion with a Nepalese neighbor, Tanka Bhujel, the vice principal at the school where he worked, sealed Goyal's eventual choice. Bhujel told him, "If you go to law school, you'll have access to resources. You'll still need us, and we'll still need you."

Goyal has likely exceeded Bhujel's expectations; during his three years at the Law School Goyal raised approximately \$70,000 for "Hope for Water" and its sister program, "Hope for Education," which provides support to schools in Dhankatu. He returned to Nepal six times while attending NYU, and witnessed the district's transformation into an independent and viable community. The water system has also grown; 150 spigots deliver a daily allowance of 300 liters of water to most residences. Engineering jobs were created to keep the community selfsufficient; a cottage-industry cooperative occupies the women who no longer have to transport water in containers; and the district has so far turned a \$5,000 profit by selling water to other villages.

Despite being singled out at graduation ceremonies with the Eric Dean Bender Prize in recognition of his outstanding commitment to public service apart from Law School commitments, Goyal is modest about his achievements. At press time, he was studying for the bar and planning a visit to Nepal after the test. "I never imagined," he says, "that I had the power to alter someone else's life." Clearly, he also had the power to change his own.

NYU, Columbia Face Off for Good Cause



Even its high-spirited fans couldn't lift NYU's offense.

y all rights, the b-ball rivalry between the Columbia and NYU law schools should Dhave been intense, what with their being tied at No. 4 in the 2007 U.S. News & World Report law school rankings (NYU moved

up from No. 5). Recent high-profile faculty defections from Morningside Heights to Greenwich Village, including labor and employment expert Cynthia Estlund and legal philosopher Jeremy Waldron, should have added fuel to the fire. But the competition fizzled on the court as the Violets quickly fell behind the Lions. The defeat (Columbia won 67 to 48) ended NYU's three-year winning streak. The halftime game was equally disappointing as Columbia, even without former team captain Samuel Issacharoff, now on the NYU faculty, beat NYU, 3 to 2.

But there was consolation to be found in the charitable funds raised and split between the schools' public interest career centers. NYU's portion: \$36,000 to fund summer internships. That's something both sides can cheer about.

Order of the Coif Inducts Noted Alumna



Sheila Birnbaum with Dean Richard Revesz, left, Professor Oscar Chase and Vice Dean Clayton Gillette.

S tudents, family members, professors and friends who gathered for this year's Order of the Coif ceremony were reminded of how far women have come in academia and the workplace in general when the "Queen of Torts" Sheila Birnbaum '65 spoke upon receiving her honorary induction into the prestigious honor society.

The Order of the Coif—named for the white wig and skullcap formerly worn by

serjeants-at-law in medieval England inducts those law students who are in the top 10 percent after six semesters. Inductees also graduate magna cum laude.

Oscar Chase, Russell D. Niles Professor of Law and president of the NYU chapter of the order, congratulated this year's crop of students. "It's a pleasure to greet the spectacular students who have achieved this academic success, and to share the moment with their friends and families," said Chase.

Dean Richard Revesz introduced the accomplished Sheila Birnbaum with obvious affection. The head of the Complex Mass Torts and Insurance Litigation Group at Skadden, Arps, Slate, Meagher & Flom, Birnbaum has argued twice before the Supreme Court, representing Metro-North Railroad and State Farm insurance, and won both times. On this occasion, she reflected not on her current practice but on her nearly to years as a law professor and the first woman associate dean at NYU years ago. "We're looking forward to your delegating your work to these promising individuals," said Revesz, "and your coming back to teach."

"My memories of teaching and of being the associate dean are the highlights of my life," Birnbaum said, visibly moved.

She recalled that when she graduated from law school in the '6os women were not given judicial clerkships and could not work with the attorney general or handle felony cases with the district attorney's office "because these jobs were not considered ladylike."

Birnbaum returned to her alma mater first as a visiting professor in 1975. Having had no women mentors to guide her, she relied on what experience she did have: "Before coming to law school, I taught fourth graders," Birnbaum said, laughing. "I used what I learned there in my law school classes: Never turn your back on a class, and be very strict or they'll take advantage of you."

Korematsu Lecture: A Disobedient Civil Servant

enry David Thoreau's "Civil Disobedience" might seem an unlikely touchstone for a congressman, but for Representative Mike Honda, the essay serves as a how-to guide for responsibly challenging the government's reach while also serving the diverse constituency of Northern California's 15th District.

"Part of patriotism is knowing where and how to challenge authority," said Honda. "It is part of being an American."

As the keynote speaker for the seventh annual Korematsu Lecture last April, Honda explored this theme in his speech, "Civil Rights and Civil Liberties Post-9/11," in which he candidly described how legally sanctioned racism shaped his beliefs.

A third-generation Japanese American, Honda was just six months old when Japanese forces attacked Pearl Harbor. Two months later, on February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, sanctioning the internment of American citizens of Japanese ancestry in the western United States. Honda and his family were subsequently interned

in Amache, Colorado, where he spent his early childhood.

The memory of this injustice stayed with Honda. He went on to build schools and health care facilities in El Salvador with the Peace Corps and spent 20 years as a science teacher and principal in two public schools before eventually becoming the first Asian Pacific American to

serve on the Santa Clara County Board of Supervisors in California. Today, in addition to holding a congressional seat, he serves as the vice chair of the Democratic National Committee and as chair of the Congressional Asian Pacific American Caucus.

"The Constitution is rarely challenged in times of tranquility," Honda said, referring to both his own internment and the accounts of governmental overreaching after 9/11. Honda attracted the ire of his con-

gressional peers by condemning racial profiling in airport security checks, by opposing the Patriot Act and its infringements on civil liberties, and by speaking out against reported violations of the Constitution.

Fear and complacency, said Honda, are what allow people to stay silent. "Under this regime, we don't have a lot of debate," warned Honda. "This country

has to be bigger than fear. It takes practice for us to check our fears."

Honda also invited what few politicians do: criticism. He asked his listeners to stand up to elected officials who are complicit in sacrificing civil liberties and human rights. "Keep our feet to the fire," he urged, "and protect the country from all enemies, including ourselves."





Jay Neveloff, Beverly Farrell, Dean Richard Revesz and NYU President John Sexton after a four-way pie toss.

The Law School Raises the Bar on Public Interest Fund-raising Alumni form first-ever auction committee and the evening yields a record-breaking \$139,000

Diver Carter '06, the Student Bar Association president and ersatz auctioneer, stood next to a grinning Dean Richard Revesz on the stage of Tishman Auditorium during the Public Service Auction last March. Carter pointed into the crowd, taking bids on the last item of the night: the privilege of throwing pies in the faces of Revesz and NYU President John Sexton.

"How much do you hate pie, Dean Revesz?" Carter asked.

"Lots!" replied Revesz, as the bids kept rolling in.

Too bad for the dean, because he and Sexton were about to square off against Jay Neveloff '74 and Beverly Farrell '01 in an impromptu pie fight that brought in \$1,050 to benefit the Law School's summer programs in public interest.

The auction's proceeds help fund students to work at public interest organizations both in the United States and abroad. Last year, reports Deb Ellis, assistant dean for the Public Interest Law Center, NYU funded more than 300 students working in 31 countries.

In the end more than \$139,000 was raised, making this year's auction the most successful in the history of the event. Alumni helped plan this auction—a first—and their participation was a big reason for the record-breaking outcome. The 22-person alumni auction committee, chaired by Neveloff and his wife, Arlene, worked with students to solicit donated items from members of the community for both the silent and live auctions. As a result of their efforts, the auction itself was awarded the President's Service Award for Volunteerism and Community Service, which recognizes outstanding efforts to support charitable causes at the university, and in the greater community of New York City.

The alumni effort was also reflected in the greater variety and sophistication of the prizes. During the silent auction, held in Greenberg Lounge, guests bid on weekend getaways to Colorado's Beaver Creek resort, vintage Bordeaux and dinners at top restaurants such as Babbo and Lever House.

The stakes were raised in Tishman when guest auctioneers Jason Washington '07 and Professors Cynthia Estlund and Samuel Issacharoff brought bidders to their feet, pitting students against alumni for extravagant prizes.

A night of tournament poker with World Series of Poker record-setter Wendeen Eolis went for \$2,500, while a diamond necklace from M. Fabrikant & Sons was snatched up for \$6,000. The night's largest bid, commanding an impressive \$6,700, fetched a pair of Super Bowl tickets and VIP passes to a Friday night pre-game party in Miami.

"The Public Service Auction represents student and alumni support for our commitment to public interest legal practice," says Ellis.

"It was gratifying to see the superb job the student committee did, and the overwhelming support of the faculty and alumni," Neveloff said, adding, "besides, where else can you see President Sexton and Dean Revesz getting pies thrown in their faces?" •

To donate items or volunteer for the alumni committee for the March 1, 2007, auction, please call the Office of Development and Alumni Relations at (212) 992-8801.

Cheers to the Marden Winner

Joanna Cohn Weiss '06, arguing for the petitioner in Carla Tortelli v. U.S., won the Best Oralist Award at the 20th annual Orison S. Marden Moot Court Competition. The hypothetical case, prepared by Andrew Hodgetts '07 and Rachel McCracker '07, borrowed characters from a certain '80s TV sitcom set in a Boston bar. In appealing her conviction for the murder of postal worker Cliff Clavin. barmaid Carla Tortelli claimed the prosecution violated her Fifth Amendment rights by using her pre-arrest silence against her at trial and guestioned whether a district court judge has the authority to order that a sentence run consecutively to a yet-to-be-imposed state court sentence. Ofer Reger '07 was the other petitioner's counsel, while Elisabeth Genn '06 and Daniel Samann '07 argued for the respondent. U.S. Court of Appeals judges Robert Katzmann of the Second Circuit, M. Blane Michael '68 of the Fourth Circuit and Marjorie Rendell of the Third Circuit were the judges.

Causes and Principles to Believe In

Aside from exams and papers, students as editors of journals or members of organizations pour a tremendous amount of time and energy into multipanel symposia on topics that often inspire passionate debate. Below are brief descriptions of panel discussions from the legal issues concerning alternative energy to the Voting Rights Act.

Constitutional Implications of the War on Terror—*NYU School of Law Annual Survey of American Law*

There were lively panel discussions on "Extraterritorial Applications of Constitutional Rights" and "The Role and Enforcement of International Law in U.S. Courts," but the symposium's third panel, on "Coercive Interrogations," inspired the most spirited debate. Professor Joe Margulies of the University of Chicago Law School asked, "Is the president allowed to say, 'I know that torture will lead to American safety?'" And Renee Redman, legal director of the American Civil Liberties Union of Connecticut, noted that under the Bush administration's definition of acceptable interrogation techniques, many of Saddam Hussein's methods would have been defensible as well. Glibly putting it all into perspective, adjunct professor Abraham Wagner of Columbia University's School of

International and Public Affairs compared what he called the "old morality" to the "new reality." In the new reality, he says, we live in the age of a new breed of terrorist, when torture saves lives, and therefore, "due process is for sissies."

The New Power Generation: Environmental Law and Electricity Innovation— NYU Environmental Law Journal

With pressures mounting in the energy sector due to national security, rising oil and natural gas prices, climate change and pollution control concerns, this colloquium explored domestic regulatory policy, the influence of domestic politics and developments in international electricity policy.

Professor Katrina Wyman moderated the panel on politics, during which the panelists explored several actual examples of alternative energy generation projects, including Cape Wind in Nantucket Sound, the Regional Greenhouse Gas Initiative, the New York State Renewable Portfolio Standard and the development of electricity resources on public lands in the Western U.S. The discussion was particularly timely because as it was unfolding, Congress was debating an amendment to a Coast Guard appropriations bill that would give the Massachusetts governor and the Coast Guard a veto over the Cape Wind project. A few months after the conference, the original amendment was scuttled, leaving only the Coast Guard to decide if the offshore wind farms impeded safe navigation.

Carter-Baker and Beyond: The Work of the Commission on Federal Election Reform and Implications for Reauthorization of the Voting Rights Act—NYU Journal of Legislation and Public Policy

The drawn-out voting recounts and dramatic judicial conclusion to the 2000 presidential election made it clear that the electoral process needs closer examination, if not reform. As its title conveys, this February symposium examined the September 2005 final report of the Commission on Federal Election Reform, also known as the Carter-Baker commission for its cochairs former President Jimmy Carter and former Secretary of State James Baker III, and debated the Voting Rights Act.

Professor Samuel Issacharoff moderated the second panel, on whether to reauthorize Section 5 of the Voting Rights Act. (In July, the Senate did indeed vote to renew it.) Section 5 was meant to prevent discrimination by freezing election procedures in certain states until any new procedures have been subjected to review. Professor Guy-Uriel Charles of the University of Minnesota Law School said a study of the objection letters the Department of Justice receives shows that Section 5 is no longer effective. However, Douglas Kellner, cochairman of the New York State Board of Elections, disagreed. "The most important reason for keeping Section 5 is that it does force election officials to think about the effect of everything they do on minorities," he said. "And that's a good thing in the long run."

BALSA Founder's Dinner



In 1968, Algernon Johnson Cooper '69 founded what's now the Black Allied Law Students Association (BALSA) at NYU School of Law. Known elsewhere as the National Black Law Students Association, the affinity group is prominent at every accredited law school in the country, with 6,000 members across the nation. After the BALSA symposium last October, the group held a Founder's Dinner, during which alumni spoke about what BALSA meant for them as students. The evening's highlight, however, was Cooper's announcement of a campaign to raise \$40 million within two years—a million for each year of the group's existence—to fund a national office and provide self-sufficiency.

In the photo above, Cooper is fifth from the right, surrounded by NYU School of Law students and alumni. From left: Robert Peters '07, Toby Lewis '08, Jimmy Yan '97, Morenike Williams '07, Lurie Daniel-Favors '05, Jason Washington '07, Candice Jones '07, Laurice Thrasher '07, Arinze Onugha '07, Marcia Henry '07 and Donesha Dennis '08.

Problems of Censorship in a New Technological Age: The Internet, Child Pornography, and the Future of the **Obscenity Doctrine**—The Review of Law and Social Change

This symposium focused on three of the most imperative topics related to pornography: "Internet Pornography and Technology: Is Filtering the Solution?"; "Drawing a Line: Child Pornography"; and "The Future of the Obscenity Doctrine." Moderated by Professor Paul Chevigny, the most contentious panel discussion was on child pornography. Andrew Oosterbaan, child exploitation and obscenity section chief of the U.S. Department of Justice, said the Internet "legitimized and rationalized this behavior" and served as an "x-factor" in that "predators realized for the first time that they were not alone." Professor Amy Adler took a different tack and focused on mainstream images of children that are "not illegal, but flirt on the edge," and explored how mainstream American culture is pushing the sexualization of children.

Prosecutorial and Judicial Discretion and Minorities: Where Do We Go from Here?-Black Allied Law Students Association (BALSA)

The BALSA 2005 Fall Conference brought together notable judges, academics, prosecutors and public defenders to explore how race affects the prosecution and sentencing of criminal offenders.

Professor Bryan Stevenson moderated the day's two panels, which brought to light preventive legislative measures intended to reduce unequal treatment of minorities, and alternative solutions to reduce the number of African-American and Latino males in prison and on death row.

The morning panel discussion on prosecutorial restraint evoked a call for prudence in the criminal justice system. Prosecutors, said Bronx County District Attorney Robert Johnson, must develop a nuanced touch when exercising discretion in their choices for setting bail, selecting juries and recommending the death penalty.

Paul Butler, a professor at the George Washington University School of Law, called Johnson a prime example of a progressive prosecutor, adding that prosecutors have far more power than governors and judges when it comes to influencing and shaping the criminal justice system.

"It is that power that affects freedom and lives," noted Avis Buchanan, director of the D.C. Public Defender Service, adding that prosecutorial and sentencing discretion is what will make the criminal justice system a more effective means to bettering society.

In a Dog-Eat-Dog World, Do Animals Have Legal Rights?

Capping off the first year that the Law School offered an animal law course, the NYU Student Animal Legal Defense Fund organized its inaugural symposium, "Confronting Barriers to the Courtroom for Animal Advocates." Welcoming the participants and an audience of lawyers and law students, Vice Dean Clayton Gillette noted, "The fact that a new field has arisen is a remarkable event in the history of legal education."

NYU Adjunct Professor David Wolfson. who teaches animal law, and Laura Ireland Moore, founder and director of the National Center for Animal Law, co-moderated the most thought-provoking panel, "Linking Cultural and Legal Transitions," which explored the dynamic between cultural views and treatment of animals on the one hand and the legal status of animals on the other. UCLA Professor of Law Taimie Bryant noted that society's false and pervasive notion that we care about animals undermines efforts to address ways animals are actually mistreated, while Dale Jamieson, NYU professor of environmental studies and affiliated professor of law, observed, "We're living in a time in which our moral relationships with animals are being radically transformed."

NYU Professor of English and Drama Una Chaudhuri, who works in the new field of critical animal studies, pointed out that animal advocates face the unique hurdle of representing a group that cannot speak for itself. She echoed Gillette, who earlier in the day said this type of representation raises "complicated, difficult and fascinating" questions such as, What exactly are the rights that are to be protected? And, since animals can't represent their own interests, who is charged with addressing them?

The two other panels focused precisely on those questions. Litigators including Katherine Meyer of the public interest firm Meyer Glitzenstein & Crystal discussed the evolution of federal standing law and the challenges current standing doctrine poses for animal advocates, as well as potential avenues to standing in federal and state courts. Later, five panelists creatively raised causes of action, such as loss of companionship claims in veterinary malpractice suits.

In closing, Wolfson acknowledged that legal change occurs slowly, but, striking a positive, and wry, note, he said that "lawyers are particularly good at doing hard work that isn't particularly glamorous."



Taimie Bryant

Una Chaudhuri

Human Rights and Governmental Obligations in the Wake of Natural Disasters-NYU Law Students for Human Rights

During Mardi Gras, while CNN showed New Orleans bravely celebrating its worldrenowned revels, this symposium's participants discussed the aftermaths of Hurricane Katrina, the Indian Ocean tsunami and even the manmade disasters of 9/11.

"After a major natural disaster, the question that goes through minds is, Why?" said symposium chair Matt Schrumpf '07. "But the sad and unfortunate tragedy is that the problems that result are manmade and follow the disaster." Among the panels was "Natural Disasters and Human Rights: How Do We Respond?" which focused on internally displaced persons-and led to a discussion of class and race bias in disaster response. Cathy Albisa, executive director of

Dale Jamieson

David Wolfson

the National Economic, Social and Cultural Rights Initiative, said "those impacted have instinctually embraced this as a question of human rights." She cited the response to Hurricane Wilma in October 2005 as proof of biased treatment.

Twenty thousand migrant farm workers were stranded in the storm's path in Collier County, Florida, while the sheriff's department focused on evacuating the city of Naples, where the annual median income is \$65,641. Albisa found confirmation in former FEMA chief of staff Jane Bullock, who left the agency in 2000 after 22 years of service. Bullock, who has been outspoken in her criticism of FEMA under the Bush administration, charged that in the wake of Hurricane Katrina, FEMA placed politics above the fair treatment of American citizens. "The human rights issue was not [paramount]," she said.

Law & (Spontaneous) Order

Richard Epstein shines as the first Friedrich A. von Hayek lecturer



Hayek lecturer Richard Epstein was in residence at the Law School for two weeks last fall.

Friedrich A. von Hayek, the Austrianborn Nobel Prize-winning economic liberal, was a proponent of voluntary exchange within a free market system, and staunchly opposed socialism and central planning as the means toward economic development.

The NYU Journal of Law & Liberty, a student publication "devoted to the development and analysis of classical liberal thought," held its first Friedrich A. von Hayek Lecture in Law last September, featuring the energetic and engaging Professor Richard Epstein as its inaugural speaker.

Epstein, who is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School, kicked off his brief in-residence stay at NYU with his lecture "Intuition, Custom and Protocol: What Are the Sound Sources of Human Knowledge?" During his talk, he examined how Hayek might have understood human nature, our traditions and the choices we make, and then applied Hayek's theory of spontaneous order—defined as unplanned cooperation among members of a society—to legal frameworks.

Intuition, as Epstein defined it, relies on a set of three basic societal norms: condemnation of acts of aggression, reciprocity in social transactions and revulsion of acts of deviance. These norms suppress violent crime, set the terms for contracts and prohibit taboo acts. Unlike Hayek, who believed that an individual's moral compass guides a society toward order, Epstein asserts that people will inevitably find exceptions and ways to circumvent these norms (killing in self-defense, for example) and so the creation of laws to sort things out is always necessary.

To define custom, Epstein cited the development of language. No centralized government agency forms a language; rather, it is a collective product agreed upon and utilized by individuals gradually over time. However, in order to resolve extremely critical issues facing a society (the depletion of natural resources, unfair compensation for land), custom may need to be forsaken, allowing a forced evolution to take place in the form of legislation—something somewhat contradictory to Hayek's laissezfaire philosophy of spontaneous order.

Epstein compared his final topic, protocol (which he defined as "a rigorous program that you follow, come hell or high water"), to intuition by highlighting how, in modern day cases of risk assessment and liability, stringent steps need to be taken and regulations must be observed in order to keep society safe. Epstein explored Hayek's theory's restrictions by suggesting that protocol based on data, and instituted by one central organization, will serve society better than multiple individuals deciding things for themselves.

Boiling down Hayek's model to an image, Epstein remarked that Hayek's legal system would "have sharp boundary lines, and then once those boundary lines are clear, let individuals figure out what to do." He recounted that Hayek argued a dispute with the Federal Communications Commission (FCC) in 1944, during which New Deal Supreme Court Justice Felix Frankfurter countered Hayek and said that the government should draw those boundary lines, and, as with a highway, also control the traffic's flow. "Hayek said that the reason why highways work is that we set the rules and you figure out where to go," Epstein said, adding, "We have had an empirical test: Highways do just fine-the FCC doesn't do so good!"

Public Interest Job Fair: Just Beginnings

B y far the largest event of its kind in the nation, the 29th annual Public Interest Legal Career Fair drew 170 employers and students from more than 21 schools to

NYU's campus last February. Employers praised the convenience of the venue and the caliber of the job candidates. "We identified more highly qualified students than we are able to accommodate for the summer," said Craig Levine '91, senior counsel and policy director for the New Jersey Institute for Social Justice.

One of the impressive students Levine identified is Marcia Del Rios '07, who found the event extraordinarily efficient. "I really appreciate that the fair brings employers from a variety of places and fields and has them here at our disposal in

Rios. Conversion Conversion

one place," said Del Rios. "It is a very, very convenient way to find a job." Del Rios ultimately accepted a position with Levine's organization because "they were more than willing to cater my summer experience to my interests and offered me the opportunity to work on a new project that involves direct service and policy research."



Liens and Torts and Bars, Oh My! There's no place like Contracts, Dorothy learns in the 2006 Law Revue

he student-produced musical spoof, *The Wizard of Lawz*, follows Dorothy and her three companions as she encounters many common law school travails—and some random wrong turns—on her way back to Contracts class.

Dorothy, played by Melanie Hirsch '07, wakes up in a strange land after thinking too hard in her Contracts class. She quickly meets up with dreamy Noah Feldmander (Eric Feder '07), the "Profitch of the Middle East," and the Munchkins (Carla Small '07, Joe Abraham '07, Sarah Burleson '07 and Deborah Katz '07). Advising her to follow the Sullivan Road to seek the all-knowing Wizard of Lawz, they bestow on her a pair of ruby-studded Gucci orthotics to help her get where she is going.

In her travels, Dorothy encounters the Wicked Profitch Clayton Gilletu (Matthew Dewitz '08), who will stop at nothing to get the ruby orthotics. She also befriends Deepa (Madeline Zamoyski '08), a job-crazed 2L; Arthur (Kyle Hallstrom '08), a class-skipping 3L; and Sarah (Gillian Burgess '06), a liberal LL.M. in search of a clue.

The four companions encounter many familiar law school adventures played out in song, such as "One Class, Boring," as the characters lament their six-hour professional responsibility class. "Sell Out" pokes fun at students who profess an interest in public service but wind up taking jobs at corporate law firms, and "Someday Long



After Law School" spoofs the mind-numbing work those sellouts encounter.

There are detours through pop culture, such as law professors vying to become Donald Trump's apprentice (Professor Amy Adler, played by Rachel Pasternak 'o6, bests Derrick Bell (Ariel Joseph 'o6), a tap-dancing Paul Chevigny (Jason Davis 'o7) and David Richards (David Greenberg 'o8)), and through recent school history, as the *Journal of Social Change* faces off against the *Journal of Law & Liberty*.

In the Law Revue tradition, the faculty members who have been satirized good-

naturedly send up themselves. So, Professor Noah Feldman appears with a photo of himself to gaze at while Professor Paul Chevigny taps out a little impromptu dance.

In the grand finale, Dorothy discovers that the Wizard of Lawz is Dean Revesz, who confesses he isn't really a wizard. Dorothy negotiates a return to Contracts, where she confronts the wicked Gilletu and melts him into goo. Ultimately the evening ends with the students striking a note of gratitude as the cast gathers together to sing "Wizard 'o6," for the faculty which has given them "all we'll ever need."

The Wide-Angle Lens of the Law

This year, students seeking a greater understanding of political, religious, civil and human rights issues invited guests to discuss pressing events occurring in Denmark, Japan, Libya, Palestine and Chechnya.

Rights, Religion and Civility: Talking About the Danish Cartoon Controversy

When cartoons depicting the Prophet Mohammed—published by the conservative Danish newspaper *Jyllands-Posten* in 2005—were reprinted in papers around the world, Muslim protesters rioted, calling them blasphemous and "Islamophobic," while the papers' editors claimed a right to free speech.

Last April, Law Students for Human Rights and the Islamic Law Students Association assembled a panel of scholars including Professors Noah Feldman and Philip Alston, CUNY history professor Ervand Abrahamian and Dr. Syed Naqvi, chairman of the Islamic Information Center, to discuss the controversy.

Without justifying the violence, Naqvi felt the demonstrators reacted to the defamation of the Prophet and of religion in general. "Muslims see the Prophet as the finest human being on the planet," said Naqvi. The demonstrators, Naqvi added, would reserve the same fervor for other "immaculate personalities" such as Moses, Jesus and the Virgin Mary.

In Islamic law, representations of the Prophet Mohammed are forbidden in order to avert idolatry. Alston concurred, and, referring to Denmark's conservative bent, added, "There has been an abdication of responsibility on the part of the Danish Prime Minister."

This observation led to a hypothesis that the cartoons' publication might have been a provocation by *Jyllands-Posten*, and that the depiction of Muslims as extremists was meant to polarize Denmark's heterogenous, conservative society.

In the end, the panelists agreed that the issue boils down to respect. "What the West needs to ask itself is, 'Why do so many Muslims feel disrespected?" Feldman said. "On all sides of this question, we have seen a shameful lack of civility."

Japanese Only: Fighting for Equality, One Business At a Time

The 2005 antidiscrimination lawsuit that went before Japan's Supreme Court started when Arudou Debito couldn't take a bath.

Arudou is David Aldwinckle, formerly of New York. Even after becoming a naturalized citizen of Japan in 2000, he was



ACTIVIST OR SCOURGE?: Arudou Debito.

denied entrance to the Yunohana *onsen*—a Japanese hot spring—in the port city of Otaru because of its "Japanese only" policy, originally instituted to prevent Caucasian sailors on leave from "fouling the bathwater." The discriminatory policy has been adopted by restaurants, salons and other businesses around the country. The Asia Law Society hosted Arudou's visit to NYU on March 28, during which he described his eight-year legal battle to combat this policy.

"I'm a father of two with a Japanese woman and employed as a tenured instructor at a university in Hokkaido," Arudou says of why he's fighting. "I bought land and built a house out in the countryside in 1997, which was the main reason I took Japanese citizenship." His exclusion violates article 14 of Japan's constitution as well as provisions of the United Nations' Committee on the Elimination of Racial Discrimination convention, which were signed by Japan.

In 2001, Arudou was awarded 1 million yen, about \$8,500, in damages from the *onsen*, but lost his case and subsequent ones against Otaru City. In 2005 the Japanese Supreme Court summarily dismissed Arudou's case for "not involving any constitutional issues." At the time of his NYU visit, Arudou was planning to sue the national government anew for violating the U.N. convention.

All over Japan, Arudou is seen as a controversial figure, depicted in one Englishlanguage magazine as both devil and angel. But for American law students, "Mr. Arudou's legal battle is important for many reasons," said Jesse Hwang '07, former president of the Asia Law Society. "We can learn a lot from legal systems abroad as we deal with our own problems of injustice."

A Threat to Society?: Arbitrary Detention of Women and Girls in Libya

The Islamic and the Middle Eastern Law Students associations at NYU partnered with Human Rights Watch (HRW) Young Advocates to host a presentation last March by Farida Deif, a researcher for the Women's Rights Division of HRW. Her 2006 report on the involuntary detention of Libyan women in "social rehabilitation facilities" exposed a chilling practice that robs its victims of due process and dignity.

The majority of the women in these centers were placed there by their families after they had been raped or sexually assaulted. The women are viewed not as victims, but rather as criminals in need of moral correction through religious education, solitary confinement, starvation and invasive "forced virginity testing" by male attendants.

"These girls are seen as having somehow strayed from 'the path,'" says Deif, who was granted unprecedented access to tour the facilities and to speak to the women and girls being held there. Since Libya does not recognize violence against women as a crime, the roots of these injustices are deep and knotty. Officials "thought that these facilities were a testament to the largesse of the Libyan welfare system [in] that they are providing shelter and food for these women," says Deif.

After the release of Deif's report in February 2006, the Libyan government established a council to investigate the physical and psychological well-being of the women being held.



UNVEILING LIBYA'S VICTIMS: Human rights advocate Farida Deif.

Palestine, Hamas and the Future of Politics in the Middle East

When it comes to promoting democracy in the Middle East, be careful what you wish for. In the January 2006 Palestinian Legislative Council election, Hamas—recognized as a terrorist entity by the United States and the E.U.—won a majority 74 of 132 seats, leaving the West to wonder how exactly to read this democratic coup.

The NYU Middle Eastern and Islamic Law Students associations and the National Lawyers Guild quickly convened a panel to discuss the election and its significance days after the outcome.

"Widespread corruption permeating the Palestinian Authority as well as chronic lawlessness and a lack of security for the average Palestinian had a strong impact on voter behavior," said Middle Eastern association member Kumar Rao 'o6, before introducing panelists Professor Noah Feldman, Global Visiting Professor Sami Zubaida and NYU Professor of Middle Eastern Studies Zachary Lockman.

In Muslim countries in which free elections have been held, parties that combine Islam with democracy have historically been successful, Feldman explained. This was the case with Hamas, which seemed to rise above the corruption of the Palestinian Authority and promoted welfare programs in the Gaza Strip—which has long suffered from a listless economy and limited future prospects for its large youth population.

Lockman traced Hamas's victory to the failure of the 1993 Oslo Accords, which called for a partial withdrawal of Israeli forces from the West Bank and the Gaza Strip. However, the number of Jewish settlers in these territories doubled, and Hamas reinforced its hard-line refusal to recognize Israel.

The panel discussion was a first response to a surprising political outcome, and all three panelists agreed that it was too early to tell exactly what the future of the Middle East holds. Zubaida, however, hazarded a prediction: "The victory of Hamas hasn't very much altered the problems of Palestinian society nor Israeli-Palestinian relations."

Human Rights, Humanitarian Crisis and the Conflict in Chechnya

Although the bloodiest battles of the Second Chechen War ended in 2002, kidnappings and civilian murders continue as Russia and Chechnya struggle over the degree of the latter's independence.

Last March, Law Students for Human Rights held a panel discussion on the current humanitarian situation in Chechnya and the decisions of the European Court of Human Rights pertaining to the conflict. Research scholar Mary Holland moderated the discussion among William Abresch, director of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice; Almut Rochowanski, cofounder of the Chechnya Advocacy Network; and Rachel Denber, a senior staff member at Human Rights Watch.

Rochowanski described the insufferable conditions that Chechen civilians endure as a result of the withdrawal of humanitarian aid by non-governmental organizations. Internal displacement, a collapsed economy and a stunted educational infrastructure have bred apathy and discord, while hazards from the unregulated disposal of chemical waste from refineries cause illness and numerous birth defects.

Denber characterized the situation as "widening chaos driven by poverty and corruption" and blamed the muted global response on "Chechen fatigue" and fears of alienating Russian President Vladimir Putin.

Abresch cited three crucial rulings by the European Court of Human Rights in which it was decided that Russia had violated the human rights of six Chechen civilians who were killed during military operations in 1999 and 2000. He called these judgments crucial accomplishments in the battle to getting all governments to comply with human rights law.



INVESTING IN HUMAN CAPITAL: (1) From left, Charles Klein '63, his Law and Business Scholar Deidrie Stone '08, Joyce Lowinson and Dean Richard Revesz. (2) Grotius scholar Quang Trinh '06. (3) From left, Trustee Warren Sinsheimer (LL.M. '57) and Public Service Scholars Gabe Freiman '06, Ani Mason '07 and Ryan Downer '08. (4) Trustee Dwight D. Opperman with his scholarship recipient Jonathan King '07. (5) Kenneth Raisler '76 with Sullivan & Cromwell Public Interest Scholars Nicholas Durham '08, left, Rose Cahn '07 and Adam Heintz '06. (6) Trustee Florence Davis '79 with Dean Revesz.

STUDENT SCHOLARSHIP

Tax Havens and the Global Tax Melting Pot



ax havens have been considered a threat by higher-taxing countries for several decades, but Chloe Burnett (LL.M. '05) discovered that controlled foreign corporations (CFC) tax laws have not fully evolved to meet the threat in today's world of global capital. "Twenty-five countries have introduced CFC rules since John F. Kennedy launched the first CFC regime in 1962," says Burnett. "But in some ways CFC regimes are still stuck in the 1960s." In her paper "From the CFC Babel to the Round Table: Replacing CFC Regimes for a Collective Attribution System," Burnett suggests a reciprocal groupbased model for reform.

Burnett wrote the paper, from which the following excerpt is taken, under the supervision of Professor H. David Rosenbloom. It was published in Tax Notes International in 2005, and wonfirst prize in both the Theodore Tannenwald Jr. Tax Scholarship Competition and the International Fiscal Association U.S. Branch Writing Competition. Burnett also won the Flora and Jacob S. Newman Prize for excellence in the NYU LL.M. International Taxation Program in 2005. After graduating in May 2005, Burnett returned to her home city of Sydney, Australia, where she currently is a lawyer in the tax department at Allens Arthur Robinson Solicitors. She will begin clerking for Justice Richard Edmonds of the Federal Court of Australia in December 2006 and will also continue her second year as a part-time lecturer in the Tax LL.M. program at Sydney University.

Burnett traces her interest in international tax law to this central conundrum: commerce knows no borders, whereas a state can tax only people and transactions connected to that state. She also enjoys the worldly nature of her research: "I have traveled to 25 countries in the 25 years of my life so far, and I hope to keep increasing this number in conjunction with my interest in international tax." Before arriving at New York University, Burnett worked for the London offices of the law firm Slaughter and May after finishing her Bachelor of Laws and Bachelor of Commerce at the University of Sydney.

Introduction

The discourse worldwide on controlled foreign corporation (CFC) rules is already considerable, but it is perhaps not too late to bring another model to the table. Instead of the orthodoxy, where CFC rules are devised and administered exclusively from within each of the 25 countries with CFC regimes, the article (of which this is a summary) proposes a reciprocal CFC regime among an economically substantial group of OECD countries, herein referred to as "the group" or "the reciprocal group." The model proposes that the countries in the group agree to exempt each others' CFCs from attribution and work toward unified rules for attributing the income of CFCs resident outside the group.

The CFC rules under discussion are those by which income earned in a tax year by some foreign corporations controlled by domestic shareholders is taxable to those shareholders in the same year, regardless of whether the foreign corporation makes a distribution to them. Over 25 countries now have CFC rules, after the United States launched the first CFC regime in 1962. The process of deeming a foreign corporation's income to be the income of domestic shareholders is hereafter referred to as "attribution."

Background

The proposed model was inspired by international tax reforms Australia introduced in 2004. Australia will no longer subject to attribution CFCs resident in the United States, the United Kingdom, Japan, Germany, France, Canada or New Zealand, except for income passed through a designated concessionary tax regime in one of the seven countries. The article encourages several countries, Australia included, to go beyond the Australian reforms to a model with a radically different perspective.

Principles on Which the Model Is Based

The model's core principle is that CFC rules can be better designed and administered by domestic governments acting in concert. That is a synthesis of three basic propositions: First, that discouraging tax-motivated investment in tax havens and preferential regimes is the main purpose of CFC rules. Second, that addressing the problems caused by havens and preferential regimes is a common goal of at least a substantial group of OECD countries. Third, that collective measures are the most effective path toward that common goal.

The Model

The heart of the model is that among the group there shall be deferral (or exemption, in territorial systems) of undistributed foreign business income of CFCs resident in any of the other group countries. The group could comprise the United States, Canada, the United Kingdom, France, Germany, Italy, Norway, Sweden, Finland, Japan, Australia and New Zealand, and efforts to expand the list for legitimate reasons should be made. It is true that under the current CFC regimes of the above twelve countries, most of the income in question would not ultimately be attributable. That result, however, is arrived at through wildly varying mechanisms. Additionally, many of these mechanisms, like thresholds of notional tax payable, require inefficient duplication and calculation. To account for small or irreconcilable differences among respective tax systems of group countries, exceptions to exemption or deferral can be adopted for specific items of income taxed concessionally or not at all in other group countries.

The main determinant of attribution is the residence of the CFC, not the source of its income. That is a relatively simple approach in the face of multitier multinationals, and the reciprocal nature of the model means it is also effective. A three-tier example illustrates this. Consider a Japanese entity with an Australian CFC (CFC 1), which in turn has a CFC (CFC 2) in a nongroup country. CFC 2's income would be exempt from attribution in Japan, indeed in any group country other than Australia. That is because, under the model, Australia is the first and only jurisdiction to attribute/tax this income, applying the common CFC rules described herein.

Ideally, all of the income of nongroup CFCs should be presumptively attributable and subjected to a high-tax kick-out. There should be a reasonably high degree of uniformity among group countries of the rules by which nongroup country CFC income is attributed. Without this, differences could be exploited and the rule representing the lowest common denominator in any given circumstance would effectively apply across the group. That possibility inheres, for example, in the three-tier example described above. The Australian entity may have been interposed solely to replace the Japanese CFC rules with those of Australia because, for example, the third-tier entity is earning active royalty income in Ireland. That income qualifies for Australia's active income exception, whereas under the Japanese CFC rules, Ireland is a tax haven and royalties are always attributable.

Benefits of the Model

The model is likely to have a mildly positive effect on the revenues of countries in the group. The essence of this model is that it produces no less tax revenue, but features fewer and substantially simplified rules and calculations. Compliance and administration savings may be positive. The model's concessional items list protects against lowtaxed income from group countries slipping through the net. A collective form may also be more effective in targeting some of the loopholes and arbitrage opportunities within and among CFC regimes.

Attitudinal change also provides benefits. The word "foreign" in 'CFC' may subtly cast foreign source income as guilty until proven innocent. International tax harmonization and comity have increased substantially since 1962. The prima facie attribution of any foreign-source income that can occur under many current CFC regimes, along with complex CFC compliance requirements, creates legitimate irritation among corporations engaged in business overseas not primarily motivated by tax considerations. There is, however, no intention to deride existing CFC regimes; it is the success and wide adoption of CFC regimes since 1962 that has now closed the need for their broad application. In some ways, historical broad-application CFC legislation could be seen as an example of successful legislation-that which eventually obviates the need for itself.

The collective and reciprocal nature of the model addresses many "competitiveness" concerns of countries with powerful multinational corporations, previously a sticking point preventing CFC reform. The prospect of, for example, a German IT company being allowed to defer Dutch source income while a U.S. IT company must pay current tax on its Dutch source income is eliminated through reciprocity and uniformity.

The Group

The 12 countries suggested as a starting point for the group are the United States, Canada, the United Kingdom, France, Germany, Italy, Norway, Sweden, Finland, Japan, Australia and New Zealand. That is already a substantial list, but since inclusiveness is the most important feature of the group, other countries should be considered.

To join the reciprocal group, countries must be prepared to modify their CFC rules to, or toward, the consensus model devised by the group. A country's willingness to do this, and to make consequential amendments to its other tax laws like its corporate income tax rates and preferential tax regimes, has to be weighed by the country against the benefits of joining the reciprocal scheme. Certainly, those non-group countries—income from which is consistently subject to the high-tax kick-out after prima facie attribution—might campaign for group membership and make the necessary reforms. A major benefit of group-country residence is being excused from having to do the calculations at all.

Countries that pointedly maintain or develop tax laws substantially different from the group norm, such as Ireland, Hong Kong and the Netherlands, present one of the biggest knots in the model. Those nations have developed, diverse economies, and so offer potential nontax investment attractions. However, their effective rates of tax on business or on particular entities are significantly lower than the group average and appear to distort investments toward those countries, thus perpetrating the inefficiency mischief at which antihaven measures are directed. So one could ask, why should interests in those countries be exempt from the same sort of attribution that would hit interests in Vanuatu and Barbados? Developed economies such as Ireland are more able than many "blacklisted" tax havens to bear the cost of restructuring to absorb the withdrawal of foreign investment. This is an issue for discussion.

Conclusion

Of all the conceivable ways to structure an attribution system to target tax havens and preferential regimes, a reciprocal, jurisdiction-based scheme has much to recommend it. The potential efficiencies from largely replacing 12 or more cacophonous CFC regimes with one system, and categorizing income by jurisdiction rather than by a dizzying array of transactions, are considerable. The frank identification of countries that use tax rates and regimes as incentives to divert capital may lead these countries to reform to reap the benefits of the reciprocal scheme.

On a practical front, design and technical analyses of this model will surely spur new dilemmas, even before the complications of political deal-making. However, those considerations do not derogate from the vision of the article—to propel an awareness of CFC developments in Australia into an idea for reform that has a clear antihaven philosophy, a dream of simplicity and a multilateral perspective.

The author would like to thank David Rosenbloom, Ruth Mason and the rest of the tax faculty for their support and suggestions.

Evaluating a New Judicial Remedy for Defective Agency Rulemakings



aving graduated with honors in public policy from Brown University in 1999, Kristina Daugirdas '05 particularly enjoyed her first-year Administrative and Regulatory State class, which gave her a new vantage point from which to analyze and understand government agencies. A question that intrigued her was, What shapes an agency's response when its policy is successfully challenged in court? One factor-whether the court vacated the flawed agency rules or instead allowed such rules to remain in place while the agency reworked them—appeared important, but "I was surprised to find that many judicial opinions devoted little space to it," she says. This observation formed the starting point for the paper excerpted here, "Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings," which was published in the May 2005 issue of the NYU Law Review.

In addition to winning the Paul D. Kaufman Memorial Award for the most outstanding note published in the Law Review, Daugirdas has received numerous

honors during her three years at NYU. She was named a Pomeroy Scholar and Butler Scholar for being one of the top 10 students at the conclusion of her first and second years, respectively, and won the Maurice Goodman Memorial Prize for outstanding scholarship and character and the Edward Weinfeld Prize for distinguished scholarship in Civil Procedure and Federal Courts. She was also awarded the Furman Scholarship, which goes to students who show particular promise in becoming legal academics. Daugirdas plans to become an academic focusing in administrative and international law. "I enjoy the challenge of making sense of new topics in a creative way," she says.

Before entering law school, Daugirdas earned a postgraduate diploma in economics, with distinction, from the London School of Economics in 2002. After graduating from NYU, Daugirdas clerked for the Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia Circuit. This fall she will join the Office of the Legal Adviser at the State Department in Washington, D.C.

or many reasons, Congress often paints with a broad brush when enacting legislation. In any particular case it may do so because it wants to preserve flexibility, because it lacks scientific or technical expertise, or because hashing out the details could splinter a fragile political coalition. Regardless of the cause, the result is that administrative agencies have lots of choices in how they implement statutes. The Administrative Procedure Act (APA) couples this discretion with the requirement that agencies explain the choices they make. Of course, agencies don't always live up to this obligation. When regulations lack an explicit, complete and logical rationale, they are vulnerable to lawsuits that seek to strike them down for being, in the APA's words, "arbitrary and capricious."

In general, whenever a reviewing court agrees with a litigant that a particular regulation was inadequately explained, the court vacates that regulation and leaves the agency to choose between modifying the regulation's substance, supplying a new explanation for the old regulation or, possibly, abandoning the attempt to regulate by promulgating comprehensive rules. Courts make a point of remaining agnostic about which option the agencies pursue.

For the agencies, coming up with new explanations-or new regulationsdemands substantial investment of time and resources. In the meantime, a court's decision to vacate leaves a regulatory gap, and the consequences of such a gap can be severe. For example, the National Highway Traffic Safety Administration estimates that had the D.C. Circuit not vacated an early rule requiring air bags in automobiles, thousands of lives would have been saved and millions of serious injuries would have been prevented between 1972 and 1987. In another instance, a court's decision to vacate a rule promulgated 10 years earlier by the Environmental Protection Agency threatened to invalidate scores of criminal convictions and civil fines. In general, the disruption caused by vacating agency action is greatest when a court strikes down rules that play an integral role in a particular regulatory regime, and upon which both regulated entities and regulatory beneficiaries had come to rely.

There is an alternative to vacating rules for inadequate explanation. In the last decade or so, the D.C. Circuit has frequently remanded rules to agencies without vacating them. When a court remands a rule without vacating it, the agency can continue to implement the challenged regulation while it addresses the flaws identified by the reviewing court. As when rules are vacated, the agency can cure the defects by repromulgating the same rule with a different rationale or by promulgating a different rule. Remand without vacatur (RWV) can be an attractive option because it allows an agency to bolster an inadequate explanation without being subjected to a high-cost remedy that interrupts its ability to implement a particular regulatory regime.

The case for RWV is strongest where the costs of vacating rules are very high while the flaw identified by the reviewing court is relatively minor, so that the benefits derived from a more thoroughly reasoned decision are comparatively small. The benefits might be limited because almost any agency action can be vulnerable to attack for inadequate explanation. Some commentators have concluded that "finding a gap, or many gaps, in any regulation should be child's play." While this is an overstatement, it is true that gaps identified during judicial review may not reflect genuine shortcomings in the agency's reasoning process. For example, one former D.C. Circuit judge

ne key problem that the survey identifies is that when panels of the D.C. Circuit apply the Allied-Signal test, they frequently neglect the first of its two prongs. With some regularity, courts evaluate the seriousness of the deficiencies in the agency's reasoning so leniently that the test fails to serve as a meaningful screening device for the appropriateness of RWV. The graver the deficiency, the more likely the agency will adopt a different policy on remand, and the less compelling is the argument for RWV. Because a different policy would require parties to change their behavior, RWV will delay but not avoid whatever disruption vacatur might bring. The D.C. Circuit could improve its targeting of the remedy by evaluating more stringently the probability that on remand the agency will conclude that its initial policy choice is insupportable.

Still, some analysis is better than no analysis. Sometimes the court decides not to vacate without any discussion whatsoever. In one case, the majority remanded a rule without specifying whether it had vacated the rule; only the dissenting judge's objection made clear that the majority had chosen RWV. Given its importance to the

Had the D.C. Circuit not vacated an early rule requiring air bags in automobiles, thousands of lives might have been saved and millions of serious injuries prevented between 1972 and 1987.

noted that most remands for inadequate explanation are "caused by the agency's failure to communicate or explain to generalist judges what they are doing, not by the agency's failure to do enough research or garner sufficient expert opinions for the record."

The D.C. Circuit has articulated a sensible test for deciding whether RWV is an appropriate remedy in Allied-Signal v. U.S. Nuclear Regulatory Commission. That test weighs (1) the seriousness of the deficiencies in the agency's action against (2) the disruptive consequences of vacating the challenged regulations. Theoretically, it should identify exactly those cases where RWV is most justified. But how well does practice align with theory? A comprehensive survey of the D.C. Circuit's RWV decisions, considered together with empirical evidence describing how agencies respond to those decisions, suggests there's room for improvement....

agency, to regulated entities, and to regulatory beneficiaries, the lack of attention devoted to the decision whether to vacate in this and some other cases is surprising and troubling. The absence of discussion in some published opinions obscures the D.C. Circuit's decisionmaking process and makes it more difficult to evaluate whether the court is using RWV appropriately and effectively....

ven if courts perfectly targeted RWV to only those cases in which a rigorous application of the *Allied-Signal* test indicated it was appropriate, there's still the problem of the incentives agencies face after courts have issued their opinions. Previous literature has focused on the possibility that agencies might become sloppier in explaining their future regulatory choices because RWV lowers the cost to the agency of losing in court. While commentators have emphasized these troubling longerterm incentives, empirical evidence of how agencies have actually responded to specific decisions highlights the problematic incentives in the particular cases in which RWV is applied. Specifically, in RWV cases it may be rational for an agency to respond as though the court had affirmed the challenged rule instead of finding it flawed.

Agencies behave strategically; their resources are limited, and they are conscious of the costs and benefits of choosing particular courses of action. On the one hand, agencies do not gain very much from revising inadequate explanations because they already have the authority to continue implementing the challenged rules. On the other hand, the costs can be significant. Allocating resources to address the court's remand may not be a trivial matter; agencies can secure additional staff or funds to comply with court decisions only rarely, so devoting resources to the remand requires pulling them away from other areas. In this context, it is unsurprising that empirical evidence of how agencies have responded to the D.C. Circuit's recent RWV decisions indicates that fortifying explanations that courts found inadequate is not a high priority.

Courts are not powerless in the face of these incentives, however. They possess tools to spur agencies into action. For example, courts can limit the time that agencies have to correct the deficiencies in their explanations by vacating the rules if the agency should fail to do so within a particular window. Interestingly, the D.C. Circuit used such tools more rarely in recent years than in previous decades: judicial decisions were more likely to add "teeth" to the RWV remedy in the years before it became a more common one....

ourts exercise enormous discretion in deciding whether or not to vacate regulations while agencies correct the defects in their explanations. Leaving regulations in place can provide significant health and safety protection to regulatory beneficiaries but also imposes costs on regulated entities; for both parties the presence or absence of regulation has significant consequences that may be counted in lives saved or dollars expended. Before applying RWV, courts should ensure that the remedy is justified and should take account of how agencies are likely to respond. Unless they do so, courts are unlikely to make effective use of this potentially valuable remedy.

The author gratefully acknowledges the assistance of Professors Richard Pildes, Rachel Barkow and Richard Stewart.

Around the Law School

POWERS ON POWER: The Law School invited respected—or even controversial—authorities to address pressing questions about the state of our world and how it's run. John Dean, above, former counsel to President Richard Nixon, invoked the notorious lessons of the Watergate era. More wisdom came from Supreme Court Justice Stephen Breyer, Constitutional Court of Germany Judge Gertrude Lübbe-Wolff, the *New Republic*'s Leon Wieseltier, former Deputy Treasury Secretary Roger Altman and others.

AW AND SECURITY

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How Much Executive Power Is Too Much? It All Depends...

he Center on Law and Security at the NYU School of Law convened top lawyers, academics, historians, journalists and politicians to argue critical topics concerning the defined roles of the three branches of American government, and how they interact during times of war and peace. The daylong conversation, "Presidential Powers: An American Debate," took place last April prior to the Supreme Court's Hamdan decision vacating controversial policies regarding military tribunals, defining enemy combatants and stressing the relevancy of the Geneva Conventions. "John Dean asked me what we hope to accomplish today," Karen Greenberg, executive director of the center, said when she introduced the former counsel to President Richard Nixon, and the event's keynote speaker. "I told him, 'a sustained, engaged dialogue; there's much too little of it in the United States."

Dean, whose new book, Conservatives Without Conscience, was published in July 2006, and whose bona fides on the topic of executive overreaching are impeccable, said, "After Watergate, I thought the imperial presidency had made its way into the history books." His experiences as counsel for the besmirched Nixon administration provided a sobering backdrop for the day's discussions. "Today," he said, "the lesson of Watergate is, 'Don't get caught, and if you do, tough it out and say you've got the power." He talked about the bad old days in the Nixon White House-recalling being ordered to arrange a punitive tax audit for the Scanlon Monthly, which had accused then-Vice President Spiro Agnew of attempting to repeal the Bill of Rights and to cancel the 1972 elections. He also cited Jack Caulfield's quashed plot to firebomb the Brookings Institution in retaliation for its criticism of the Vietnam War. While these abuses of power were extreme, he then described Executive Order 13233, which annulled a 1978 law that turns presidential records over to the public 12 years after an executive's departure. President Bush signed the order within his first year of office-just weeks after 9/11. The level of secrecy of this administration, Dean warned, has "reached a startling stage."

The rest of the day was devoted to mostly polite but sometimes heated conversations moderated by the faculty codirectors of the center, Professors Noah Feldman, David Golove, Stephen Holmes and Richard Pildes. The framers of the constitution had not predicted political parties, said Pildes, and

the idea of checks and balances presumes Congress's desire to fully participate in governing as well as oversight. Sidney Blumenthal, former adviser to President Clinton, agreed that partisan abuse is "political in character, fundamentally." But Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, and Viet Dinh, a former U.S. assistant attorney general for legal policy from 2001 to 2003, disagreed. "Congress is inadequate to deal with security and dispatch in matters of national security," said Dinh. Laws passed by Congress "encourage the President to claim and exercise inherent powers," insisted Posner, particularly in light of new threats to the U.S.

Former Nebraska senator, and now president of the New School, Bob Kerrey offered harsher criticism of Congress. The War Powers Resolution, Kerrey said, did not provide carte blanche to any president to challenge an abstract terrorist threat. Congress was explicitly to blame, concurred Michael Vatis, a lawyer at Steptoe & Johnson in Washington, D.C., for allowing the executive branch to waylay civil liberties by authorizing clandestine wiretaps on U.S. citizens and indefinitely detaining enemy combatants. If the president is allowed to take power, Vatis said, then he'll take it. Patrick Philbin, former associate deputy attorney general at the Department of Justice, countered that the war on terror "is a very different war, but a war nonetheless" and the President must be allowed to act.

Donna Newman, the New York City criminal defense attorney assigned in 2002 to represent Jose Padilla, a U.S. citizen deemed an enemy combatant, said that she was dumbfounded by the disregard for due process where her client was concerned. The President has constructed an "atmosphere of fear" as a basis for grabbing power. "It's a fear of liberty, not terrorism," she said, "to somehow say that freedom is what makes us vulnerable."



SQUARING OFF: From left, top: former Clinton adviser Sidney Blumenthal, CLS Executive Director Karen Greenberg and former U.S. Assistant Attorney General Viet Dinh; Middle: Attorney Michael Vatis, former Senator and President of the New School Bob Kerrey and Professor Richard Pildes; Bottom: Judge Richard Posner, former Associate Deputy Attorney General Patrick Philbin and federal litigator Donna Newman.

Three Conversations Between Western Nations



Professor Richard Pildes and Justice Stephen Breyer. Upper right: Professor Samuel Issacharoff and Jonathan Faull. Judge Gertrude Lübbe-Wolff and Professor Joseph Weiler.

On September 20, 2005, Federal Constitutional Court of Germany Judge Gertrude Lübbe-Wolff and United States Supreme Court Justice Stephen Breyer sat down for the first in a series of three Transatlantic Dialogues. Hosted by the Hauser Global Law School Program, the talks were meant to strengthen the ties between the European Union and the United States. Sudler Family Professor of Constitutional Law Richard Pildes and University Professor and Joseph Straus Professor of Law Joseph Weiler together moderated the far-ranging and often personal conversation.

At the time, the confirmation hearings of now-Chief Justice John Roberts Jr. dominated the headlines, and the retirement of Justice Sandra Day O'Connor was imminent, so appointment methods were on everyone's mind.

"There is no hearing like here in the United States, with the Senate Judicial Committee," said Lübbe-Wolff of the German system. "But there is an informal agreement that judges will be elected in such a way as to mirror the proportions of the different party groups in Parliament."

Breyer was chief counsel to the Senate Judiciary Committee during the Carter administration, and had a hand in nominating some 200 federal judges to the bench. "I think the actual operation of our system has an element of politics, but it is much less political than the Europeans think," said Breyer, "because by and large it is in the politician's interest to appoint a qualified person who will be recognized as such, by the Bar and the lawyers in the community."

Lübbe-Wolff then asked Breyer if he thought transparency was a unique characteristic of the American system. "The criterion for selection you mentioned—this incentive to select the best people—works better in a system where the individual judge is more visible," she posited.

But Breyer demurred, saying he wondered if he was the best person to ask, since he's been only on the receiving end of a Senate inquiry. "For me to talk about the appointment process to the Supreme Court is like looking at the recipe for Chicken à la King," he said slyly, "from the point of view of the chicken."

On November 23, the Hauser Global Law School and the Center on Law and Security jointly hosted a Transatlantic Dialogue at which Valerie E. Caproni, general counsel of the Federal Bureau of Investigation and Jonathan Faull, director general of justice, freedom and security at the European Commission, discussed a global response to the threat of terrorism. Moderated by Bonnie and Richard Reiss Professor of Constitutional Law Samuel Issacharoff and New York University Professor of Politics Martin Schain, the discussion centered on how different nations, drawing on different legal traditions, must work together.

On both sides of the Atlantic, post-9/11, there was a perception that existing law was inadequate to meet the new threat. In the U.S., counterterrorism laws "read like a cobbled-together greatest hits from the federal code," said Issacharoff. Much has changed in the last four years, he said, however, and a reliance on interstate commerce statutes has been overtaken by new antiterrorism legislation. For the European Union, the key question has been how nations can work together to investigate and prosecute terrorists. There is no Europe-wide criminal code. Due to increasingly porous national borders since the '90s, the E.U. can no longer rely on border control; member states must rely on the cooperation of law enforcement bodies. One new piece of legislation, the European Arrest Warrant, was pushed through quickly

post-9/11. After the attempted bombings in London on July 21, 2005, the warrant allowed for one suspect who was arrested in Rome to be extradited back to the United Kingdom within 41 days, as opposed to months—if not years or if at all—before the law passed.

However, said Faull, despite progress between countries, cooperation has often worked on a bilateral basis, rather than continent-wide. Some countries just don't have relationships with others, he said. Other legislation being considered would require telecommunications companies to retain traffic information from Internet communications. But huge cyber-dragnets are not always the most effective way to gather useful intelligence; rather, keeping close tabs on those communities that may give rise to extremism produces the most actionable information. The FBI struggles with being dislocated from communities at the grass roots level. "We are not really boots on the ground in this effort," said Caproni. As pointed out most clearly by the 9/11 Commission, lack of cooperation between U.S. law enforcement agencies has presented serious obstacles to the effective use of intelligence. In the United Kingdom, says Faull, this is less of a problem as there isn't an equivalent split between local and national law enforcement. "In a way it's a lot easier for us," he said, "because we don't have the FBI, we don't have agents."

In the wake of Abu Ghraib and other revelations, many viewed the U.S. approach to counterterrorism with deep suspicion last fall. "The people who work at the FBI are Americans too," said Caproni. From their perspective, there is a "strong desire that these [Patriot Act] provisions do not sunset," she said. "The police and law enforcement agencies love information...they have an insatiable appetite for information " "[But] they can't always have what they want," countered Faull. "It's important to remember," he said, "that, within living memory, many European nations have been under dictatorships or occupied by foreign powers, so the notion of governments operating outside of the law for any reason is abhorrent."

John Bruton, the E.U. ambassador to the U.S., joined Professor Mattias Kumm for the final dialogue in March. Bruton served as Ireland's minister of finance and minister of industry and commerce before becoming prime minister in 1994. After leaving that office in 1997, Bruton contributed to the Good Friday peace agreement in April 1998, and served as an Irish delegate during the drafting of the E.U's constitution. In 2004, he was appointed to his current post. When Kumm asked Bruton about the 2004 debate among European nations over whether to include a reference to Christianity in the E.U. constitution's preamble (the final draft made no explicit reference), he replied that he'd been pro-inclusion but accepted the outcome. "I think to make a reference to the source of values of Europeans over the last 2,000 years and to leave belief in God out of that is ludicrous, really, but, on the other hand," said Bruton, "[that reference] isn't critical to the effectiveness of the constitution."

As far as relations between the E.U. and the U.S., Bruton felt at the time that the diplomatic situation had improved markedly since President George W. Bush's reelection in 2004 as the Bush administration and the E.U. have more effectively coordinated their approaches to such issues as Syria's occupation of and withdrawal from Lebanon, and Iran and the Middle East peace process.

In fact, Bruton seemed to suggest that the E.U. might do well to take a page from America's patriotic playbook. In light of the E.U. constitution's rejection by voters in France and the Netherlands, he favors building on the existing constitutional draft by seeking new inclusions to make the document more palatable to the European public, but stressed that such a move was not enough. "[E.U. officials] have to recognize that anything that's built on the sort of voluntaristic foundation that the European Union is built on," said Bruton, "[has] to invest in all that patriotism creation activity.... The elites that have created Europe have been so convinced of the ultimate persuasiveness of their own ideas...that they feel uncomfortable [drumming up popular support for the Union].... But the Union won't stay together, I think, without the constructive harnessing of people's natural wish to affiliate to something bigger than themselves." - Atticus Gannaway

Transcending Violence



Linda Mills listens to panelist David Lewis, who counsels offenders on breaking the cycle of violence.

The Center on Violence and Recovery, founded by Professor of Social Work and Affiliated Professor of Law Linda Mills, organized three panel discussions last year, each addressing the use of restorative justice in cases of violent crime. The last of the panels, "Minding the Gap," highlighted the center's innovative pilot program in Nogales, Arizona, that diverts prison sentences for domestic abusers to counseling in the form of peacemaking circles. In peacemaking circles, victims, their offenders and other family members talk openly to get to the root causes of, and move beyond, the violent incidents themselves. "Domestic violence is a dynamic," said Mills, rather than an isolated occurrence or series of occurrences. As such, healing must be a reciprocal process.

The other two panels in the series were "Bad to the Bone: Rethinking Offender Recovery and Rehabilitation" and "Tell Me What a Victim Looks Like: The Problem with a One-Treatment-Fits-All Approach to Intimate Abuse."

A Place for Serious Discussion

n the world of counterterrorism, change has been coming fast. Bombings in London, Jordan and the Sinai Peninsula, and a deepening insurgency in Iraq are parts of one side of the story; others are the raw and challenging relations between Muslim communities and police, between partners in the war on terror on opposite sides of the Atlantic *and* between policymakers and their critics within the United States.

As a result, there has been much to take stock of, and for those who attended the annual conference of the NYU Center on Law and Security over the Memorial Day weekend, the opportunity to compare notes was a welcome one. Like any fast-growing industry, terrorism studies is rapidly becoming divided into a patchwork of spe-





cialties and niche operations. But the conference, held at NYU's La Pietra campus just outside Florence, Italy, continues to cover the waterfront, bringing together experts and practitioners in areas from prisoner interrogation to geopolitics, from urban police work to constitutional law and from terrorist finances to war reporting.

This was the center's third annual conference on "Prosecuting Terrorism: The Global Challenge," and as in the previous two years, the core of the program was provided by top law enforcement officials from the United States and Europe, who addressed such contentious issues as torture, renditions and the detention facility at Guantánamo. Among those present were U.S. Solicitor General Paul Clement, French investigating magistrate Jean-Louis Bruguiere, Spanish investigating magistrate and the Center on Law and Security's Distinguished Fellow Baltasar Garzón, Italy's chief antiterrorism prosecutor Armando Spataro and former U.S. Assistant Attorney General Viet Dinh.

The same sharp divide that was present last year between U.S. advocates of a "war paradigm" in the struggle against terror and their European and American critics was apparent again in discussions of such controversial U.S. practices as the detention of terrorist suspects at Guantánamo, the "black sites" used for incarcerating "high-value" al Qaeda personnel and aggressive interrogation practices. Joshua Dratel, a New York-based defense attorney who counts many accused of terrorism among his clients, spoke more pointedly than most-but captured the critics' position-when he declared that "the U.S. has adopted a war paradigm but opted out of the laws of war."

Still, there was more of a sense on both sides that in the "long war," as Washington now calls the conflict with jihadists, the existing approach will be hard to sustain. The alternative will be more emphasis on the "law enforcement" strategy preferred by European governments, which emphasizes working through traditional court proceedings and evidentiary and incarceration practices. (The change of tone preceded the Supreme Court's June 29 ruling in Hamdan v. Rumsfeld, which undermined the assertion of virtually unlimited executive branch prerogatives. As Karen Greenberg, the center's executive director, said after the decision, "Hamdan demonstrates how important it is for the U.S. to emphasize the law enforcement and criminal justice system as opposed to the war paradigm in going forward with future counterterrorism efforts.")

Among the developments that participants focused on were the increasing number of "homegrown" or "self-starter" terrorist cells, such as those that carried out the 2004 bombings in Madrid and the 2005 attacks on the London Tube. In a session devoted to "The New Face of Radicalization in Europe and America," a series of speakers noted the powerful effect that the war in Iraq has had on accelerating the spread of radicalism. As one senior European pros-

ecutor put it in the session, which was formally off the record, "War in Iraq provided an opportunity for propaganda and has led to a total failure in combating terror." A strong feeling that things would get worse before

they got better pervaded the discussion. European law enforcement would not only have to grapple with the newly radicalized activists, but also with "bleedout" from Iraq. According to one European expert speaking off the record, Abu Musab al-Zarqawi, the jihadist leader in Iraq (who was killed in June shortly after the La Pietra conference ended), "had been turning away foreign fighters in Iraq, urging them instead to prepare for conflict in their home countries."

The Middle East figured prominently in the proceedings, with both Salameh Nematt, Washington correspondent for the Arabic daily *al-Hayat*, and Emmanuel Sivan of Hebrew University asserting that it was the region most affected by the Islamist radicalism. As Sivan put it, "You cannot find a country outside Kuwait and the [United Arab] Emirates that has not had an operation motivated by al Qaeda." The likelihood of escalated violence in the region due to continued turmoil in Iraq was noted. In the opinion of *New Yorker* journalist Nir Rosen, "Things are much worse than is thought."

Other threads of discussion that ran through the two-day event concerned such issues as the ongoing tensions between the government and the press and how that affects the war on terror, and the growing politicization of issues related to counterterrorism. As faculty codirector of the Center on Law and Security and Sudler Family Professor of Constitutional Law Richard Pildes noted, this has become an endemic problem, and "we can't only blame the politicians." Questions, he pointed out, such as "how early we can define something as a crime" were generating more heat than light, and yet answers were urgently needed to deal with the terrorist threat. Even if, in public, polarization continues to be the norm, the Center on Law and Security's conference provided a forum where politics took a back seat to substantive discussion of actual problems. -Daniel Benjamin
Kofi's Choice: Duty Pulls Annan in Two Directions

On February 24, 2006, the Institute for International Law and Justice (IILJ) convened a day-long conference on The Role of the United Nations Secretary-General that included the participation of Sir Emyr Jones Parry, permanent representative of the United Kingdom to the U.N., former Under-Secretary-General Sir Brian Urquhart and Under-Secretary-General for Communications and Public Information Shashi Tharoor, among more than 100 others. Simon Chesterman, then-director of the IILJ, penned this op-ed a few months prior, in which he describes the precarious political and moral position of the U.N. and its secretary-general. This piece appeared in the International Herald Tribune on September 9, 2005.

reform always begs the question of whether that reform must take place primarily in the structures, procedures and personnel that make up the United Nations, or in the willingness of member states to use them.

As the United Nations prepares for its 60th General Assembly in September, similar questions of principles, practice and expectations confront the member states and the Secretariat.

In the past, major reform has flowed from political will. World War I led to the establishment of the League of Nations, World War II to the U.N. The only major change in U.N. institutions in the past two generations was a result of decolonization, which doubled its membership in the 1960s.



Conference organizer and then-director of the Institute for International Law and Justice Simon Chesterman, left, with Sir Emyr Jones Parry, permanent representative of the United Kingdom to the United Nations.

The secretary-general of the United Nations is a unique figure in world politics. At once civil servant and secular pope, he or she depends on states for both the legitimacy and resources that make the United Nations possible. The formal powers of the office are limited but have been supplemented over time by delegated authority, political influence, and moral standing. All have been challenged by the recent turbulent period for the United Nations and the incumbent secretary-general, Kofi Annan, in particular.

This is of particular relevance to the current issue of U.N. reform, which Annan cut short his vacation to salvage. Discussion of Today, however, that process of reform has been turned on its head. Instead of being driven by political will, the present institutional reform proposals seek to create it. Like fairies and paper money, the U.N. ceases to exist if people stop believing in it. This was the existential crisis posed by the war in Iraq.

Annan has been at the heart of that effort to rebuild faith in the U.N., but it has coincided with the period in his career when his political and moral authority has been at its weakest.

His report, "In Larger Freedom," was intended to set both the tone and the substantive agenda for the next General Assembly, which culminates in a summit meeting on Sept. 14-16. The report was broad in scope, seeking to define a new security consensus based on the interdependence of threats and responses, and narrow in detail, setting specific targets for official development assistance, calling for the creation of a Human Rights Council and a Peace-Building Commission, and outlining a longawaited definition of terrorism.

As the member states gather in New York, there will be much talk of consensus, though this is a veil for the underlying issues of politics and expectations. This has been evident in the paralyzing debate over seats on the Council, which has sucked the oxygen from other issues and divided the member states in a process that was meant to unite them.

The give and take of political negotiations—most recently including U.S. Ambassador John Bolton's editorial scythe—has already challenged Annan's agenda, but he has consciously put pressure on member states not to leave New York empty-handed. He has also tied his own legacy to the outcome of the push for reform. This is certainly a more desirable legacy than any other news story from the United Nations in the past two years, but it points to the ambiguous position occupied by the secretary-general.

At the heart of this is a basic question about the nature of the United Nations: Is it a thing, or a place? Is it a standing diplomatic conference, where member states meet and discuss issues, or is it an independent entity with a moral and political role of its own? It is, of course, both—but that duality becomes schizophrenia in the person of the secretary-general. As chief administrative officer of the organization, he must implement the wishes of the members; as a moral and political operator he is frequently called upon to be the embodiment of their better natures.

The current reform process is collapsing in part because the secretary-general overreached in the breadth of his vision and is now underused by the membership. Forced to the sidelines by states jealous of their sovereignty and by his own tarnished status, the reform process draws not on the better nature of states but races towards their lowest common denominator.

Stalin famously underestimated the power of the pope by asking how many military divisions he commanded. The secretary-general, Nobel Peace Prize notwithstanding, knows that he commands no divisions. The problem, as the U.N. celebrates a grim 60th birthday, is that he now also lacks a congregation.

Reforming Courts from Within



Chief Justice Randall Shepard of the Supreme Court of Indiana gives the Brennan Lecture.

n his lecture, "The New Role of State Supreme Courts as Engines of Court Reform," Chief Justice Randall Shepard of the Supreme Court of Indiana argued that state supreme courts have undertaken important legislative duties and, along the way, have brought about significant social, procedural and jurisprudential changes. Delivering the 12th Annual Justice William J. Brennan Jr. Lecture on State Courts and Social Justice, cosponsored by the Dwight D. Opperman Institute of Judicial Administration and the Brennan Center for Justice, Shepard discussed recent state decisions and reforms that have not only affected the judiciary and the law, but influenced society, scholarship and academics.

Shepard cited the landmark decisions on civil unions and gay marriage from the supreme courts of Vermont and Massachusetts, respectively, as recent examples of social change. He also said changes concerning medical malpractice and criminal law have been affected by state rulings. He credited states for having been at the forefront of equalizing access to legal services for the poor as federal budget cuts have weakened legal aid to the indigent since the 1980s and states have picked up the slack. Professional advancement of minorities is another issue being comprehensively addressed by state supreme courts at a time when federal funds for programs to encourage minority hiring are declining. The Georgia, Kentucky and Indiana state supreme courts have created clerkship programs for minorities, something that Shepard says "adds not only valuable experience, but valuable cachet to a legal career."

With the greater importance of the state supreme courts come more expansive functions and, naturally, an increase in administrative responsibilities. Shepard noted a trend in the state judicial systems of California, Iowa, Kentucky and Minnesota toward "unification," wherein the entire state's court system, from top to bottom, is funded by the state. Previously, local trial courts were funded by county governments, while the appellate courts were the financial responsibility of the state government.

"There is a valuable lesson embedded in this assessment of the new work undertaken by these institutions that used to be solely appellate bodies," Shepard said, looking toward the future and the changing role of the state supreme courts in American legal society. Shepard also looked back to the past, quoting none other than Justice Brennan, who said that it has always been the judiciary's core responsibility "to help our fellow citizens in fostering a decent, safe and prosperous society by building a system of justice that befits a great nation."

Bell Measures Progress at 10th Annual Lecture

W hat could be better than spending your 75th birthday surrounded by friends and family? Just ask Professor Derrick Bell Jr., who on November 3, 2005 gave the 10th Annual Derrick Bell Lecture on Race in American Society.

In previous years, the Bell Lecture has invited outstanding scholars to the Law School to discuss current trends or topics on race and class in the United States. Previous lecturers have included Harvard Professor Charles Ogletree and Professor Cheryl Harris of the UCLA School of Law. In a slight twist this year, Bell himself chose to deliver his lecture, "And We Are Still Not Saved: 21st Century Constitutional Conflicts."

Bell described the ubiquitous social crises facing all Americans in the first decade of the 21st century. A collective rising fear over terrorism and the hopeless situation in Iraq, a growing racial and economic chasm separating the rich from the poor, and the disenfranchisement of African-American voters are, in Bell's estimation, just a few of the issues that need the critical attention of all individuals, not just minorities.

Despite the serious problems considered, a festive atmosphere prevailed. The eve-

ning had begun with a spirited celebration: His wife Janet—"the force of nature behind the Bell Lecture," said NYU President John Sexton—brought the audience to its feet for a jubilant "Happy Birthday" sing-along.



A FAMILY VALUED: Professor Derrick Bell Jr. celebrates his 75th birthday with his wife, Janet, and his children, from left, Carter, Douglass and Derrick III.

When a Judge's Opinion Is Just Dictum



Professor Norman Dorsen, director of the James Madison Lecture series, with this year's speaker, the Honorable Pierre Leval.

"m going to talk to you about something really trivial," said Judge Pierre Leval of the United States Court of Appeals for the Second Circuit, delivering the 45th James Madison Lecture last October. His speech, "Judging Under the Constitution: Dicta About Dictum," explored the inconsequential written tangents and judicial opinions expressed in court decisions that, says Leval, have been unconstitutionally taken into consideration in other rulings.

Derived from Latin, the term dictum developed in the 18th century to refer to any point of view conveyed by a judge that has not arisen in the determination of a particular case. Leval was critical of judges who, in deciding cases, use dicta as precedents rather than ignoring them altogether. "In doing so, we fail to deliberate on the questions being decided," said Leval. "Today, dicta flex muscle to which I submit they are not entitled by constitutional right."

Leval drew a distinction between relying on dicta in judicial decisions and stare decisis, or adhering to that which has already been decided. Stare decisis relies on precedent and previous holdings to safeguard judicial decisions from capriciousness and the whimsy of judges. Dicta, because they have no legislative weight, Leval explained, cannot be challenged and should therefore not be referenced in decisions. "It is true in deciding cases under stare decisis, courts do inevitably make law, but they make law only as a consequence of the performance of their constitutional duty to decide cases," Leval said. "They have no constitutional authority to establish law otherwise."

In exemplifying the inappropriate use of dicta when deciding a case, Leval cited *Myers v. Loudoun County Public Schools* in which the U.S. Court of Appeals for the Fourth Circuit upheld the Supreme Court's decision that the Pledge of Allegiance can be said in public schools. The court referenced not the holding by the Supreme Court, but rather a dictum written in that decision.

"If established law governs the case, the court has a duty to follow the established law and if the established law is inclusive, the court is obligated under the constitution to adjudicate," Leval explained. "The circuit court did neither."

Leval suggested a cause for this trend, pointing out that the role of the judiciary has shifted from settling everyday decisions to addressing deeper social problems, which can inflate the self-image of judges and the weight of their personal opinions. He said, "We've come to see ourselves as something considerably grander."

Law School Exchanges Influence U.S. and China

R ecent legal exchange programs between law schools in the United States and China have helped change Chinese laws as well as U.S. perceptions of the Chinese legal system. That conclusion was one of the major themes to emerge from the 1th Annual Timothy A. Gelatt Dialogue on Law and Development in Asia.

Around two dozen law school professors and representatives from nonprofit and human rights organizations assembled at the Law School last January to examine joint U.S.-Chinese efforts in law reform and legal education in China. Two decades ago, China began a major overhaul of its legal system, with U.S. law schools playing a large role in the ongoing evolution.

Paul Gewirtz, Potter Stewart Professor of Constitutional Law at Yale Law School, and director of Yale's China Law Center, established in 1999, said that the center has successfully worked with Chinese legal scholars and municipal governments to update criminal laws, including helping some Chinese municipalities implement alternative sentences to incarceration. The reform process, he said, has followed an "inside-outside" strategy, meaning that the center has worked with people both inside and outside the Chinese government. "We couldn't be as effective as we think we are without the pressure of outside human rights groups, and I don't think the human rights groups could be as effective as they are without us working on the inside," he said.

Others described the process as collaborative, saying U.S. lawyers weren't just imposing America's legal system on China. "We're not trying to bring the gospel to them and convert the heathens," said Professor Jerome Cohen, who moderated the dialogue. He added that the U.S. legal scholars were "actively welcomed by the Chinese government." Nonetheless, some observers still see efforts to reform China's legal system as "missionary" work—a perception Cohen disputes, and also one that can cause friction. "We don't overlook—any of us—that we're doing controversial work," he said.

While many of the participants pointed to reforms in China, some complained that the legal system still needed to improve. Criminal defense attorney Jack Littman, who was in the audience, said he was concerned about the role that companies like Yahoo and Microsoft play in the Chinese legal system. In a well-publicized case last year, Yahoo allegedly provided information to the Chinese authorities that they used to prosecute Chinese journalist Shi Tao. He was sentenced to 10 years in prison for leaking government secrets because he forwarded an email his newspaper had received from the government to a U.S. human rights group; the message alerted journalists that the Chinese government was preparing for possible turmoil on the 15th anniversary of the Tiananmen Square protests of 1989. As one participant said about human rights abuses in China: "We can't let the short term go while we look at the long term."

Gruss Lecture



On November 22, 2005, Leon Wieseltier, the literary editor of the *New Republic* (above right, with Professor Noah Feldman), delivered the annual Caroline and Joseph S. Gruss Lecture, presented by the Hauser Global Law School Program. "Law and Patience: Unenthusiastic Reflections on Jewish Messianism" illuminated the reasons—some of them political—for the seeming contradiction between the construction of a messiah and an unwillingness to accept his existence.

Stoking a Desire to Kick Our Fossil Fuel Habit

A t a town hall meeting on October 20, 2005, a bipartisan panel discussion, "Winning the Oil Endgame for a More Secure and Profitable America," analyzed our nation's oil addiction from the financial, environmental and security angles. The experts who gathered included: Mississippi Governor Haley Barbour; the



Earth Institute's Jeffrey Sachs, who most recently published *The End of Poverty;* former Deputy Secretary of the Treasury Roger Altman; Amory Lovins, CEO of the Rocky Mountain Institute, a

nonprofit think tank that promotes efficient uses of natural resources in entrepreneurship; Charles Fox, Deputy Secretary to the Governor of New York for Clean Energy Policy; and former CIA Director James Woolsey. The event was organized by investment banking firm Fir Tree Partners President Jeffrey Tannenbaum '88 and Ilmi Granoff '07, a staff editor of the *Environmental Law Journal*, and moderated by Dean Richard Revesz.

At the time, the aftermath of Hurricane Katrina was front-page news, and Sachs used that storm, and the havoc it wreaked, as evidence of the cumulative environmental effects of carbon emissions, emphasizing that global warming has much to do with the conditions that create such vicious hurricanes. Sachs has long pushed for cleanerburning fuels as an alternative to oil, and he espoused the benefits of the Fischer-Trope method in which gasification changes coal into diesel fuel. China, he said, has already employed this process with great success to meet its skyrocketing energy needs.

Mississippi's Gulf Coast, especially its oil industry, was also hit hard during the 2005 hurricane season, and Barbour acknowledged the responsibility of all state governments to start developing cost-competitive and eco-friendly alternative fuel sources right away. Fox, who has primarily dealt with local energy reform, agreed. He said that states should be the laboratories of democracy, determining which energy and environmental policies will encourage the development of new energy sources. "The talking has to stop," said Fox. "It's time to do something and take a chance."

Perhaps the most radical ideas came from Lovins, who has frequently worked with giants such as Wal-Mart to increase profit through sustainable and environmentally friendly corporate initiatives. The *New York Times* columnist Thomas L. Friedman recently wrote about how Lovins helped Texas Instruments successfully design a completely green semiconductor wafer plant in Dallas in 2004, lowering overall utility costs and energy usage while keeping manufacturing jobs in Texas. "Oil is a great industry, but it's bad for business," Lovins proclaimed, hoisting a prototype of a car's front panel, made from a lightweight carbon fiber composite, over his head. By manufacturing automobiles made from this safe and durable material, a car's overall weight is reduced and mileage is increased exponentially. Why not do this? he asked.

The future of our national security, Woolsey said, rests in shifting American dependency on oil from the Middle East to other, more stable regions. Innovations such as developing alternate fuel sources and improving hybrid and electric automotive technology, as well as the possibility of hydrogen fuel cell usage, are also steps toward kicking our oil habit. "If the Wahhabis in Saudi Arabia are unhappy about our progress on this front," Woolsey remarked, "then we should be happy."





Stepping Up to Honor Redlich

Dean Richard Revesz dedicated the elegant staircase of the Law Library in honor of former Dean Norman Redlich (LL.M. '55) last October in a ceremony at Vanderbilt Hall. Revesz noted that during Redlich's tenure as dean, from 1975 to 1988, he oversaw many upgrades to the Law School's curriculum: He worked to diversify the student body; increased the Law School's involvement in public interest law; improved the caliber of the clinical education program; and started interdisciplinary initiatives such as the lawyering and law and philosophy programs. Redlich, who began his career at the Law School in 1960 as an associate professor, also pursued an ambitious building program, including the construction of the Mercer Street Residence and D'Agostino Hall and a new wing for the Law Library—achieved by tunneling under Sullivan Street. Revesz joked that if the already-sizable honorary plaque were to list all of Redlich's accomplishments, "it would have been too large to fit anywhere in the library."



Why the Innocent Confess

n the spring of 1989, five young men confessed to the brutal rape and beating of a 28-year-old woman who would become known to the horrified public as simply the Central Park Jogger.

In videotaped confessions, taken after hours of interrogation by NYPD detectives and trips to the crime scene, four of the five suspects looked into the camera's lens and gave accounts of how they attacked the jogger—one of the men even demonstrated how he physically overpowered her.

Thirteen years later, however, a positive DNA match and a true confession by an incarcerated serial rapist revealed that the youths hadn't committed the crime.

Why had they confessed?

Saul Kassin, a professor of psychology and the founder of legal studies at Williams College, has exhaustively studied the Central Park Jogger case, and others in which confessions proved to be false, and has even staged crimes and interrogations to investigate the phenomenon. He shared what he has learned in a provocative lecture, "Inside Interrogation: Why Innocent People Confess and What to Do About It," as part of the 2005-06 Hoffinger Colloquium.

The answer, said Kassin, is complex and can be traced to flaws in the way that detectives evaluate and interrogate suspects, guilty or innocent, in criminal investigations. "The detectives knew that the DNA didn't match," said Kassin, referring to the Central Park Jogger case. "The only evidence against them was their confessions."

Investigators, Kassin explained, extract confessions through a system of interrogation rules called the Reid Technique, which claims to turn detectives into "human lie detectors." The tech-

nique is intended to prevent interrogators from questioning and charging innocent people through a three-step method. The first step—looking for visual clues of guilt such as averting a gaze, slouching or sitting rigidly—"is the pivotal point in the life of a case," Kassin says, because if an interrogator is not persuaded of a suspect's innocence, he then becomes predisposed toward the goal of eliciting a confession.

Kassin's research proves that the Reid Technique is only 55 percent effective. Rather than removing innocent suspects, it is "a steamroller that treats the guilty and the innocent the same."

Equally troubling to Kassin are the actual questioning methods. Interrogators are allowed to present false evidence, keep suspects isolated and imply minimization of sentencing in order to draw out a confession. "You see false confessions being given in the bowels of a police station," he says. "They want to get out of there and denial is not the way that's going to happen."

Finally, Kassin blames the presentation of evidence at trial. Even though the Central Park Jogger suspects were questioned for nearly 30 hours each, the juries viewed only 20 minutes of videotaped confessions. If juries were privy to the entire interrogation, and not simply the stated confession, says Kassin, they might be able to see how an innocent person can falsely confess—or even believe through suggestion that he or she committed the crime.

New methods of suspect evaluation, including those where detecting innocent



The Hoffinger Colloquium invites scholars, lawyers, judges and journalists to discuss current trends and issues in criminal justice. In addition to Saul Kassin, the 2005-06 series featured:

"Is Prostitution Still a Crime?"

Elizabeth Bernstein, Assistant Professor of Sociology, Barnard College, Columbia University

"The End of Labor Racketeering

As We Knew It?" James B. Jacobs, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, New York University

"Eye for an Eye: Blood and Money"

William Ian Miller, Thomas G. Long Professor of Law, University of Michigan

"Criminology as a Vocation: Ethics, Responsibility, Ultimate Ends"

Robert Reiner, Professor of Criminology in the Law Department, London School of Economics

"The Political Constitution of Criminal Justice" William Stuntz,

Professor of Law, Harvard University

"Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe" James Whitman, Ford Foundation Professor of Comparative and Foreign Law, Yale University

behavior is taught as well as sniffing out guilt, plus videotaping full interrogations, says Kassin, are necessary to safeguard against false confessions. In parting, Kassin gave some unsolicited advice: He recommended that all suspects, innocent or guilty, never waive their right to an attorney.

Judges Tackle Tough Issues in Labor and Employment Law

n the area of labor and employment law, state judges routinely encounter workplace privacy, whistleblowers, independent contractors, torts and state class actions. Last November, these were also the topics of the two-day Employment Law Workshop for State Judges sponsored by the Dwight D. Opperman Institute of Judicial Administration and the Center for Labor and Employment Law. Professor Lance Liebman of Columbia University School of Law, the keynote speaker, stressed the state judiciary's key role in the field.

"Employment law is an area, quite interestingly, left to state common law," Liebman said, so it's up to the state judges to move the law forward. Leibman, who is the director of the American Law Institute (ALI), a private law reform organization, described how the institute initiates projects, called "restatements," to clarify or recommend changes in the law. The ALI is coordinating restatements, which can take up to 10 years to complete, in family, state sentencing, nonprofit and software licensing law, Liebman said. Several years ago Dwight D. Opperman Professor of Law Samuel Estreicher approached Liebman about the need for an ALI project, the first of its kind, to restate employment law.

"Our goal," said Estreicher, named one of four lead drafters of the undertaking, "is to identify and harmonize the rules that judges should be guided by in dealing with the range of issues involving employment that is not governed by statutes. Estreicher presented a draft on employment contracts to the distinguished crowd, welcoming their opinions. He examined at-will employment, bilateral agreements, unilateral employer statements, termination for "cause," and duties of good faith and fair dealing.

Liebman, who like Estreicher teaches employment law, commented that the judiciary's decisions in these cases are instrumental in his classes. In fact, Liebman said he had discussed with his students that morning a Ninth Circuit decision involving a Reno casino that fired a 20-year employee who refused to abide by a new "image transformation" program requiring women to wear makeup.

Liebman added, "We love it when you write teachable cases."

Meron Gives Keynote for Hauser Dinner

he Hauser Global Law School Program kicked off its 11th annual dinner by announcing that the Law School had signed an agreement with the National University of Singapore Faculty of Law to offer a new dual graduate degree program in Singapore. The goal, said Dean Richard Revesz, is to reach talented law students in the Asian-Pacific region who may be unable to afford to study in New York.

Revesz also saluted the Hauser program, saying that it has "truly transformed the nature of legal education in the United States." He added: "The real sign of success is that every one of our peer law schools has tried to emulate us."

In his keynote speech, "Anatomy of an International Criminal Tribunal," Charles L. Denison Professor of Law Emeritus Theodor Meron, former president of the International Criminal Tribunal for the Former Yugoslavia, outlined the thorny challenges faced by the tribunal. One question they have to answer, he said, is whether it is a violation of defendants' rights to try them for acts that weren't codified as crimes when they occurred. Meron said the answer is yes, if those acts were illegal under "customary law" in 1992, even if not criminalized under the country's then-existing penal code.

The war crimes tribunals at The Hague have helped provide a measure of justice to civilians harmed in Rwanda and the former Yugoslavia. The trials "have not been perfect, but have been a remarkably effective experiment," said Meron. The tribunals, he said, have "given the victims of horrific crimes a chance to tell their story."

Despite the dark subject matter of Meron's speech, the overall mood that evening was buoyant. Inosi Nyatta (LL.M. 'oo), an associate at Sullivan & Cromwell, said the program opened possibilities to her that she wouldn't have had in her native Kenya. "Our lives were changed," she said, "by coming to NYU and experiencing this."



Alumna Rita Hauser with Professor Theodor Meron



Oregon's Governor Theodore Kulongoski, center, stands with former New York State Attorney General Robert Abrams, left, and Dean Richard Revesz after the Abrams Public Interest Forum.

Oregon's Governor Fights to Defend Legal Aid

W ith his election in 2002, Theodore Kulongoski became the first governor in Oregon's history to serve in all three branches of state government. He had been a state representative and senator, attorney general and associate justice of the Oregon Supreme Court. One more way in which he has distinguished his current office is by acting to reverse the erosion of free legal services to the nation's poor.

Governor Kulongoski was the speaker at the Ninth Annual Attorney General Robert Abrams Public Interest Forum last January. "It is possible to achieve high public office without abandoning the noble things," said former New York State Attorney General Robert Abrams '63 during his introduction.

The governor's lecture, "The Guardians of Democracy: Public Service and the Rule of Law," was an endorsement of the importance of public interest legal work in the lives of elected officials, public defenders and private practitioners, as well as a call to action for the law students in attendance to remember the indigent who lack adequate financial resources to fight injustices.

"I believe in the law—in its majesty and its power to right wrongs," Kulongoski said, echoing Abrams's belief that achieving career success in public service without sacrificing one's integrity is not only possible, but should be the standard kept by every person entering politics. Over the past few years, since Kulongoski has been in office, he's watched as funding for Oregon's legal services organizations, delivered through the Legal Services Corporation (LSC)—a private, nonprofit group established by Congress in 1974 to provide grants to local legal aid programs around the country has been cut drastically. In 2006, Oregon's budget for these local organizations was reduced by \$3.5 million.

In the same vein, the Brennan Center for Justice at NYU scored two victories in New York with *Legal Services Corporation v. Velazquez* and *Dobbins v. Legal Services Corporation*, in 2001 and 2004, respectively, and LSC has since been barred from withholding federal funds to legal aid programs on the basis of certain restrictions.

"Oregon is now picking up the baton on the federal level," said Kulongoski, who supports the claim that the financial restrictions imposed by the government are unconstitutional under the 10th Amendment, which grants powers not given to the federal government in the constitution to the states.

"Private lawyers can stand guard over the guardians," said Kulongoski, emphasizing the role of the pro bono lawyer in the landscape of the American legal system. "Legal aid was saved by lawyers and academics who came through for poor people."

The governor ended his stirring and impassioned lecture with a quotation by John Wesley, founder of the Methodist Church, who wrote: "Do all the good you can/By all the means you can/In all the ways you can/ In all the places you can/At all the times you can/To all the people you can/As long as ever you can."

Leading Lights

The Abrams and Weiss lectures were part of the 2005-06 Leaders in Public Interest Series. In addition to Kulongoski and Rosenkranz, other topics and speakers included:

"Lawyers at the Forefront of Change in New York City Government" Carol A. Robles-Román '89, Deputy Mayor for Legal Affairs and Counsel to New York City Mayor Michael R. Bloomberg.

"Confronting Injustice" Professor Bryan Stevenson, Executive Director, Equal Justice Initiative of Alabama.

"The Passion of My Times: An Advocate's Fifty-Year Journey Through the Civil Rights Movement" William L. Taylor, Chair, Citizen's Commission on Civil Rights.

"The Fight for Universal Health Care" Ronald F. Pollack '68, Vice President & Executive Director, Families USA.

"Domestic Violence & Legal Remedies: Where Are We Going?" Mary Haviland '94, Founder and Co-Executive Director, CONNECT.

"Changing Regional Structures of Inequality: Civil Rights Work for the Next Generation" Michael A. Sarbanes '92, Executive Director, Citizens Planning and Housing Association.

"Changing the World One Person at a Time: Providing Direct Legal Services to Immigrants" Wanyong Austin '83, Managing Attorney, Immigration Legal Services Program, Lutheran Family and Community Services.

"Refugee Protection in a Post-9/11 World" Andrew Painter '96, Senior Protection Officer, United Nations High Commissioner for Refugees.

"Beyond Lawyering: A Holistic Vision of Public Defense" Robin Steinberg '82, Founder and Executive Director, Bronx Defenders.

"Reviving the Vision of the Founders: Changing the World Through Public Interest Litigation" William H. Mellor, President and General Counsel, Institute for Justice.

"Scholarship in the Public Interest" Professors Randy Hertz and Deborah Malamud, and Kirsten D. Levingston, program director, Brennan Center Criminal Justice Program.

"In the Pink Room: The Story of a Gross Miscarriage of Justice and How One Lawyer Got to the Bottom of It" Professor Steven Gillers '68 and Joel Rudin '78, The Law Offices of Joel B. Rudin.

A Preview to a Battle Lost

hree months before arguing FAIR v. Rumsfeld before the Supreme Court last December, E. Joshua Rosenkranz, a partner at Heller Ehrman and founding president of the Brennan Center for Justice, gave a preview of his case at the 2005 Melvyn and Barbara Weiss Public Interest Forum. FAIR, the Forum for Academic and Institutional Rights, is a collective of law schools-including the NYU School of Law-and professors who sued Secretary of Defense Donald Rumsfeld, seeking to prevent the enforcement of the Solomon Amendment, which requires schools receiving federal funding to give access to military recruiters. At issue: the military's "don't ask, don't tell" policy violates the schools' antidiscrimination policy.

On March 6, the Supreme Court upheld the Solomon Amendment. Chief Justice John Roberts Jr. wrote, "A military recruiter's mere presence on campus does not violate



Rosenkranz with Assistant Dean Irene Dorzback

a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."

In response, a spokesperson for NYU said, "Military recruiters...will continue to have access going forward.... Our nation's universities are not anti-military, they are anti-discrimination. Regrettably...this important distinction is lost."

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Alumni Almanac

A BANNER YEAR: "We are the Law School of opportunity, leadership and community," said Dean Richard Revesz to guests at the September 2005 Weinfeld Gala. The black-tie affair was the the official launch of the most ambitious capital campaign ever undertaken by the New York University School of Law; no other law school has attempted to raise more.

Alumni Inaugurate Ambitious New Capital Campaign

NYU School of Law went to the New York Public Library last September to cheer the launch of an audacious \$400 million capital campaign, the largest in the school's history. Lights swept the skies as alumni, faculty and friends strolled up the library's red-carpeted grand stairway. Walking past the building's majestic columns, which were bathed, for the evening, in violet light, guests stepped into the Astor Hall for cocktails and hors d'oeuvres where one-story-tall banners proclaimed the campaign's central values: opportunity, community and leadership.

"We wowed them on Fifth Avenue tonight," said Eileen FitzGerald Sudler '74, chair of the Dean's Strategic Council and member of the Campaign Steering Committee, as she and committee comember Kenneth Raisler '76 introduced the specifics of the campaign. Marking the end of the campaign's silent fund-raising phase, during which some \$165 million was raised, the gala ushered in the public phase by identifying the Law School's plans for expanding student aid and supporting numerous faculty projects. The money raised-more than \$200 million by last spring-will fund scholarships for both J.D. and LL.M. candidates, and help endow the school's distinctive Loan Repayment Assistance Program and summer public interest grants, allowing students to explore and then pursue highly competitive yet low-paying jobs that contribute to the greater good. Campaign funds will also be used to hire new faculty, increase the number of chaired professorships and support the work of the Law School's faculty-run centers and institutes. Finally, the campaign aims to increase alumni participation and to double the size of annual cash gifts. The founder of the progressive AnBryce Scholarship and the campaign's chair, Trustee Anthony Welters '77, spoke about the sense of pride and elation that accompanies supporting education. "There is nothing more fulfilling than touching someone's life," Welters said as he introduced a film that conveyed how NYU impacts the lives of those who study and work here, and so many others who are part of the Law School community. Sudler and Raisler took the stage at the end of the evening to give the assembled



CLASS ACT: The stately New York Public Library, the site of the campaign's launch, aglow in violet light.

"In a remarkably short span of time, NYU School of Law has moved into the small handful of schools at the very top tier of legal education," said Dean Richard Revesz. "We have achieved this great success by pursuing a distinctive path in legal education. The campaign will ensure that we continue on this steep trajectory." alumni something they hadn't had in some time—a homework assignment. Their task: to reconnect with an old classmate and tell that graduate about all that is happening at their alma mater. If those personal ties are reestablished, promised Raisler, opportunity, community and leadership will continue to thrive on Washington Square.

Center for Law & Business Dedicated to Lester Pollack '57

To honor Lester Pollack for more than 25 years on the Law School's board of trustees, the last eight as chairman, the NYU Center for Law & Business was renamed the NYU Lester Pollack Center for Law & Business. Pollack '57 (pictured with his wife, Geri), who has also been a member of the University's board since 1987, said, "This evening celebrates my ambitions to give back to the school that gave so much to me." He thanked Dean Thomas Cooley of the Stern School of Business and Dean Richard Revesz for bringing their two schools together to promote this interdisciplinary study.

The evening's keynote speaker was former Federal Reserve Board Chairman Paul Volcker, whom center director and Nusbaum Professor of Law and Business William Allen lauded for "the fortitude and moral leadership" necessary to eliminate double-digit inflation during the '80s.



BLAPA Honors Dutt, López and Welters

his year's Black, Latino, Asian Pacific American Law Alumni Association (BLAPA) Spring Dinner celebrated the accomplishments of Mallika Dutt '89, Professor of Clinical Law Gerald López and Law School Trustee Anthony Welters '77, who were each honored for their work on behalf of diverse communities.

As the founder and executive director of Breakthrough, Dutt uses technology and pop culture to promote human rights, particularly among young people, in the U.S. and India. Case-in-point: Breakthrough's blunt, even confrontational current ad campaign, "What kind of man are you?" informs Indians that married women are becoming infected with HIV by their husbands at alarming rates. Dutt is also the author of *With Liberty and Justice for All: Women's Human Rights in the United States* (Center for Women's Global Leadership, 1994).

López has pioneered the idea of the progressive practice of law. He teaches the Community Economic Development and Community Outreach, Education and Organizing clinics and founded the Center



From left, Mallika Dutt, Professor Gerald López and Anthony Welters were each recognized for having devoted themselves professionally and personally to giving back to their communities.

for Community Problem Solving, which in 2005 released a groundbreaking study on the health and welfare of Mexican immigrants. The center aims to help solve the social, economic and legal problems that low-income and immigrant communities face.

Welters began his distinguished career as a staff attorney at the Securities and Exchange Commission and eventually rose to become president and CEO of Ameri-Choice Corporation, a leading provider of public sector health care in New York, New Jersey and Pennsylvania. A trustee of the Law School, Welters and his wife Beatrice created the AnBryce Scholarship, which provides full tuition to J.D. students who are the first in their families to attend graduate school.

This year, BLAPA awarded four new \$1,000 clinical law and public interest graduation prizes to students Jennifer Turner '06, Susan Shin '06, Cyrus Dugger '06 and Andre Segura '06, as well as a \$10,000 public interest scholarship to Alexis Hoag '08.

No Time for Idle Chitchat at Mentoring Event

he First Annual Evening of 8 Minute Mentoring, sponsored by the Black, Latino, Asian Pacific American Law Alumni Association (BLAPA), took its cue from the speed-dating trend, giving each participating student a chance to sit down at a café table with an interested alumnus and make a connection. When time was up, a bell rang and the student moved on to meet with another mentor.

The innovative event brought together alumni from all corners of the legal world, including corporate attorneys, judges, investment bankers and public interest lawyers. Among them: retired judge Betty Staton '79; legal diversity consultant Katherine Frink-Hamlett '91, president of Frink-Hamlett Legal Solutions; and Barry Cozier '75, a former associate justice of the New York State Supreme Court Appellate Division and now a member of Epstein, Becker & Green. BLAPA organizers added a second all-alumni session for legal professionals to make industry connections.

The approach, a departure from last year, when students were assigned mentors, "transformed our traditional fall reception into an exciting mentoring experience that benefited both the alumni and student participants," said Michelle Meertens '98, president of BLAPA and an assistant vice presi-



FAST TALKING: Willkie Farr & Gallagher Associate Leslie Spencer '98 shares career wisdom and life experience.

dent and corporate secretary at the Federal Reserve Bank of New York.

Many students, like Zhiping Liu '07, were interested in hearing about following a career path toward becoming a judge, and seized the opportunity to sit with Judge Gloria Sosa-Lintner '75 of New York County Family Court. Sosa-Lintner advised Liu to be patient, get involved with local politics and try to develop what she termed a "judicial temperament" by learning from difficult cases. "Experience makes for deciphering the gray areas," said Sosa-Lintner.

In Greenberg Lounge that evening, however, it was as simple as black and white that eight minute mentoring was a success.

Bryan Stevenson Takes the Measure of Our Society; Betty Weinberg Ellerin Is Honored

Beneath the chandeliers of the Grand Ballroom of the Pierre Hotel on Fifth Avenue, this year's Alumni Luncheon paid tribute to two veterans of the fight for civil rights: one who sits on the bench, and the other who has spent a great deal of time arguing before it.

Before inviting the Honorable Betty Weinberg Ellerin '52, the first woman to be appointed to the Appellate Division of the Supreme Court of New York, up to the podium to accept the Robert B. McKay Award from New York University, he was introduced by Dean Richard Revesz as "a modern-day hero" in a "society that doesn't have many heroes." Stevenson seemed eager to shift the attention away from himself. He got straight to the point.

"As a society committed to law we are required to say things that are sometimes difficult to hear," he said. "I believe we have to judge the civility of society, the commitment of our society to the law, by how it treats the poor." 15 years, the EJI has succeeded in obtaining relief in the form of new trials, reduced sentences or exoneration for more than 70 death row prisoners.

He ascribed his deep faith in the power of words to his grandmother, as he related in a story. Stevenson's grandmother, who was born of slaves and was "absolutely the dominant force in our family," once took him aside and said: "I think you're special, I think you can do anything you want to do." These words, he said, have stayed with him and encouraged him to do his best. In contrast, Stevenson said, we as a society discourage the poor and disenfranchised.

Case in point: Last February, an Alabama Supreme Court Justice called for his colleagues on the bench to "actively resist" the U.S. Supreme Court's March 2005 decision



Bryan Stevenson has won a MacArthur Foundation "Genius Award," the ACLU's National Medal of Liberty and the American Bar Association's Wisdom Award.



Betty Weinberg Ellerin, here with Thomas Newman '60, also has won the 2005 Award for Conspicuous Service from the New York County Lawyers' Association.

Award, New York's Chief Judge Judith Kaye '62 introduced her as "a sister of the judiciary" who "has been in the forefront of the fight for justice for women, indeed against injustice of any kind."

Matching the elegance of the grand setting, Ellerin gave a simple and brief acceptance speech. She invoked an English jurist, who, when told by a defendant, "My Lord as my judge and witness, I am innocent," responded with the terse reply: "He isn't, I am, you're not." With barely more volubility, she said, "[I am] inspired to redouble my efforts to be worthy of this award."

The keynote speech was delivered by Professor of Clinical Law Bryan Stevenson, who has defended death row prisoners in the South for more than 20 years. As the recipient of numerous awards, including the 1989 Reebok Human Rights Award, the 1991 ACLU National Medal of Liberty, as well as the first Martin Luther King Jr. Humanitarian Stevenson then went on to state the powerfully disturbing facts: Sixty-one percent of inmates on death row in Alabama did not have a single witness called in their defense. Seventy percent were represented by attorneys who, by statute, could be paid only \$1,000 for any work they did outside of court to build their client's case. Thirty-one percent of black men in Alabama have lost the right to vote as a result of felon disenfranchisement legislation. In 1972, there were 200,000 people incarcerated in America's prisons; today there are 2.3 million.

"I genuinely believe we live in a system that treats you much better if you are rich and guilty than poor and innocent," he said. "It becomes necessary to say something."

In his work with the Equal Justice Initiative of Alabama (EJI), the organization that he founded and directs, Stevenson has been saying something—again and again in courts across the South. During the past in *Roper v. Simmons*, in which the Court struck down the death penalty for juveniles, said Stevenson. It is imperative, he stressed, that we fight for the rule of law not just "for the favored, not just for the empowered, but for everyone."

Stevenson wrapped up with a story about a black janitor he met in a courthouse in Alabama. The older man had come up to sit behind Stevenson in the courtroom, when a sheriff stepped over to shoo him away. "What are you doing here?" the sheriff asked. The janitor looked at the sheriff and said: "I came into this courtroom to tell this young man: Keep your eyes on the prize, hold on."

Also at the luncheon, the Law Alumni Association recognized Paul Kurland '70 for his dedicated service during his two-year term as board president, and elected Lawrence Mandelker '68 as the new board president.

Alumni Applause

Laurence Pathy '60 was made a member of the Order of Canada, the Canadian government's highest honor for lifetime achievement, on November 17, 2005.

Marc Cohen '74 was named Bankruptcy Lawyer of the Year by the Century City Bar Association on March 15, 2006. Cohen is chair of the Business Reorganization and Creditors' Rights Group in Kaye Scholer's Los Angeles office.

Wayne Positan '74, managing director of the Roseland, New Jersey law firm of Lum, Danzis, Drasco & Positan, was elected president of the New Jersey State Bar Association. He took office in May 2006.

Scott Fein (LL.M. '81) and his firm, Whiteman Osterman & Hanna, received the National Law Journal's Annual Pro Bono Award and the New York State Bar Association President's Pro Bono Award for their work on Brown v. State, a civil rights case that involved widespread racial profiling by state police in Oneonta, New York.

Marc Platt '82 won a Golden Globe on January 16, 2006, as the producer of the HBO miniseries *Empire Falls*, based on the novel by Richard Russo.

Phoebe S. Eng '89 was appointed to the board of directors of the Ms. Foundation for Women. Eng is the creative director of The Opportunity Agenda, a New York City-based think tank that works to increase opportunity and bolster human rights in the United States.

Russell Gewirtz (LL.M. '92) wrote the screenplay for Spike Lee's recent movie *Inside Man*, released in March 2006.

Daniel Nissanoff '92 is the author of *FutureShop* (Penguin, 2006), in which he explores the "new auction culture" and the phenomenon of temporary ownership. The *Wall Street Journal* named it one of the five best consumer culture books ever written.

Heather Howard '97 was appointed policy counsel for Governor Jon Corzine of New Jersey in December 2005. Howard previously served as Corzine's Senate chief of staff.

Bridget A. Brennan Voci '97, a member of Semanoff, Ormsby, Greenberg & Torchia in Jenkintown, Pennsylvania, was named a 2005 Pennsylvania "Rising Star" by Law & Politics magazine.

Alina Das '05 was named an Open Society Institute Soros Justice Fellow. Das will work at the New York State Defenders Association to create reentry and reintegration strategies for immigrants in the criminal justice system.

Landmark Rights Protected...

Arguing before the Supreme Court, a lawyer just 10 years out of school stands up for girls' health



Jennifer Dalven, center, standing in front of the U.S. Supreme Court shortly after arguing an intensely watched abortion case during a time of unprecedented transition on the bench.

o call Jennifer Dalven's first argument before the Supreme Court a challenge would be an understatement. It was November 2005 and the stakes were highshe was representing Planned Parenthood in the Court's first abortion case in six years, just at a time when the Court was undergoing some key changes. Chief Justice William Rehnquist had died and been succeeded by John Roberts Jr.; a swing vote on many abortion cases, Justice Sandra Day O'Connor had announced her retirement over the summer: and Harriet Miers, President Bush's choice for that seat, had just withdrawn her nomination. What's more, Justice Samuel Alito had been nominated, but not yet confirmed, so even on the day she argued, Dalven could not be sure that Justice O'Connor would remain on the Court to decide the case. "The Court became an ever-changing landscape," says Dalven '95 of the months leading up to the argument. "We had to prepare for a case when we didn't know who the members of the Court would be. We just put forth the arguments we thought were most persuasive." Indeed, in the end, Ayotte v. Planned Parenthood of Northern New England turned out to be Justice O'Connor's last opinion before retirement.

In January, the Supreme Court reached a unanimous decision in favor of Planned Parenthood. It found that a 2003 New Hampshire law, which prevents doctors from performing an abortion on a teenager until 48 hours after a parent has been notified, cannot be upheld because it does not allow an exception for medical emergencies. Instead of striking down the law, however, the justices sent the case back to the lower court in New Hampshire to determine whether the law should be fixed to include the medical emergency exception.

"The case raised other issues [like what legal test must courts use to decide whether to strike down an abortion law that might harm women], but they dodged those by writing a very narrow opinion, and that helped them achieve consensus," said Dalven. As the *New York Times*'s legal reporter Linda Greenhouse wrote after the hearing, "Abortion law was not about to undergo a major change in the hands of the new Roberts court, at least not yet."

Dalven, who worked as a peer educator at a family planning clinic back when she was in high school, has had a long-standing interest in reproductive rights. After law school she clerked for Judge Pierre Leval in the Second Circuit and then in 1997, after just one year at Paul, Weiss, Rifkind & Garrison, she joined the ACLU Reproductive Freedom Project.

"One of the advantages of working for a public interest institution is that they let lawyers have such fabulous experiences," said Dalven. "I'd only been out of law school for 10 years and they had no qualms about letting me argue in front of the Supreme Court. They said, 'It's your case, you get to argue it."

As grateful as she is for the favorable ruling, Dalven said, "I am concerned that this ruling will embolden legislators to pass unconstitutional laws that are dangerous to women, and force more and more women to go to court with their doctors to protect their rights and get the care they need. Striking down the entire law would have been the right thing and I'm hoping this will still be the outcome."

...And New Rights Created

Counselor convinces the highest court in Colombia that abortion is a human rights issue

n a landmark 5-3 decision last May, the Constitutional Court of Colombia ended the country's complete ban on abortion. Mónica Roa (LL.M. '03) successfully argued that the total criminalization of abortion violated Colombia's obligations to international human rights treaties that guarantee a woman's right to life, health, dignity and equality. The law now includes exceptions if the mother's life or health are at risk, if the fetus is severely malformed, or if the pregnancy is a result of rape or incest.

"I am Colombian and I wanted to do something about the issue," says Roa, a Bogotá native. She sued on behalf of Women's Link Worldwide, a clearinghouse that seeks to help women's rights advocates around the world develop effective legal strategies. Roa currently serves as the program director of the organization, which has offices in Bogotá and Madrid.

While several bills to liberalize Colombia's abortion law had failed over the past 30 years, Roa believed she had a good shot of winning when she filed suit in April 2005. The Constitutional Court had recently recognized the legal value of international human rights arguments and used them to solve constitutional challenges in cases related to



Roa opened the door to abortion rights in Colombia.

health, children and women's participation in politics. "I argued that the Court should be consistent and also recognize the legal status of these international human rights arguments when deciding the issue of abortion," says Roa.

Before this ruling, an average of 400,000 Colombian women each year risked their health and lives to seek illegal abortions. The government estimated that unsafe abortions were the third leading cause of maternal mortality.

Even more surprising than the legal victory, however, was the impact this highprofile case had on public opinion in this

Guests of the Roundtable

The Dean's Roundtable Luncheons are intimate gatherings where alumni can discuss their career paths with a dozen or so students. Dean Richard Revesz's guests during the 2005-06 academic year included:

Paul Appelbaum '98

Cofounder and former President, SeamlessWeb

Todd Arky '98 Executive Vice President, SeamlessWeb

Gary Claar '91 Managing Director, JANA Partners

Ulrika Ekman '90 Managing Director and General Counsel, Greenhill & Co.

Frank Fernandez (LL.M. '84) EVP, Secretary and General Counsel, The Home Depot

Victor Ganzi (LL.M. '81) President and CEO, The Hearst Corporation

Charles Heilbronn (LL.M. '80) Executive Vice President, Chanel Laurence Heilbronn (LL.M. '82) Treasurer, St. Bernard's School

Robert A. Kindler '80 Vice Chairman of Investment Banking, Morgan Stanley

Charles Mele '81 EVP, General Counsel and Secretary, Emdeon

Rachel Robbins '76 Former General Counsel, Citigroup International

Marshall Rose '61 Chairman and CEO, The Georgetown Group

Michael I. Roth (LL.M. '75) Chairman and CEO, The Interpublic Group

James A. Shpall '82 President, Applejack Wine & Spirits

Judah Sommer '70 Managing Director, Goldman Sachs

William Toppeta '73 (LL.M. '77) President, International, MetLife predominantly Catholic and conservative country. In May 2005, one month after Roa filed, 85 percent of Colombians were against abortion in all circumstances. By the time the decision came out, more than 60 percent supported the partial liberalization of abortion. For the first time, Colombians were talking about abortion as a human rights issue, and a matter of gender equality, social justice and public health. "Priests used to be the main sources [for quotes in the media]," says Roa. But now "doctors, feminists, lawyers and human rights activists" are sought for their opinions on abortion.

Roa believes that there will eventually be broader liberalization of abortion in Colombia. "I don't know how long it will take and what the debate in Congress will be, but I am very clear that the cause is not over and that society is better prepared to face that kind of debate now."

If anyone understands the challenges and dangers—of trying to bring about change in a resistant society, it is Roa, who was assigned bodyguards by the government after receiving threats. "Every time I go out and see the light of recognition in someone's eyes, I think, 'This person is either going to insult me or thank me.'"



Debating a (Tax) Law of Unintended Consequences

M aking amendments to already complicated tax rules is always a tricky business; the possibility of creating unintended problems looms large. That's exactly what happened in June 2005, when the Internal Revenue Service implemented revisions to Circular 230, said Michael Desmond, tax legislative counsel at the U.S. Department of the Treasury, in the sixth annual lecture on Current Issues in Taxation sponsored by the NYU School of Law Graduate Tax Program and the Tax Practice of KPMG.

The revisions to Circular 230 were intended to combat fraudulent tax shelters, but spawned controversy instead. Tax profes-



Michael Desmond, tax legislative counsel at the U.S. Department of the Treasury.

sionals immediately criticized them, arguing that the stringent requirements for giving written advice prevented lawyers from advising clients properly and that the regulations are extraordinarily complex, necessitating costly training for tax practitioners. Desmond and the other speakers-Professor Deborah Schenk (LL.M. '76), KPMG partners Frank Lavadera (LL.M. '89) and Lawrence Pollack (LL.M. '88), and Kostelanetz & Fink partner Bryan C. Skarlatos (LL.M. '91)-explored how Circular 230 might impede lawyers from doing their jobs. They noted that strict regulation on written advice left some tax professionals feeling that they can no longer counsel clients about thorny situations in writing. Boilerplate disclaimers on emails were of no help, said Lavadera, since these standard addenda have become so routine that they're virtually ignored, like "white noise." The IRS is taking such criticism to heart, said Desmond, and exploring the possibility that "the rules are actually having the opposite effect of what was intended, by curtailing good written advice between lawyers and taxpayers."

Schenk took a contrarian position on Circular 230, concluding that the tax professionals' complaints were exaggerated. "My reaction over the last year has been that the level of rhetoric was really quite extraordinary," she said. "The protests—my career is over; life as we know it will come to an end; and I'll never be able to send another email—always struck me as a lot of lawyers and accountants whining."

Analyzing Tax Reform

Just 10 days after President Bush's bipartisan panel delivered its 272-page report in November 2005 on how to fix the biggest problems in the United States tax system and how to promote economic growth for all Americans, the Graduate Tax Program held "Tax Policy in the News: Perspectives on the Recommendations of the President's Tax Reform Panel."

Professor Noël Cunningham moderated a discussion among a distinguished group of experts that included Alan Auerbach, professor of economics and the law at the University of California, Berkeley, School of Law; William Gentry, associate professor of economics at Williams College; Maya Mac-Guineas, director of the Fiscal Policy Program at the New America Foundation and Michael Graetz, the Justus S. Hotchkiss Professor of Law at Yale Law School. They examined the expansive report, which, among other things, recommended paring back the home mortgage deduction for higher priced homes and eliminating deductions for state and local taxes paid. Auerbach, who this year cotaught the Tax Policy and Public Finance Colloquium with Professor Daniel Shaviro, cited the limitations placed on home mortgage deductions as one measure that would benefit individuals with lower housing price points. Gentry, who served as a part-time consultant to the president's advisory panel, questioned the permanence of the current tax cuts and wondered whether taxes would eventually have to be raised to reduce the deficit.

In the end, the report received mixed reviews. Each expert found flaws, but also saw benefits; at least one or two things on the table will benefit everybody. As Graetz said, the advisory panel's report has a certain "smorgasbord quality."



Mary C. Bennett, senior official at the Organisation for Economic Co-operation and Development.

International Tax: Lost in Translation

wowdo you define discrimination against foreigners in international tax law? That was the question Mary C. Bennett of the Organisation for Economic Co-operation and Development (OECD) addressed in the 10th annual David R. Tillinghast Lecture on International Taxation last fall.

In "Nondiscrimination in International Tax Law: A Concept in Search of a Principle," Bennett, a former partner at Baker & McKenzie, now head of the Tax Treaty, Transfer Pricing, and Financial Transactions Division at the OECD's Centre for Tax Policy and Administration, explained that the U.S. and various other nations that comprise the OECD and the European Union have agreed in principle that they won't discriminate against foreign nationals for tax purposes. This would include direct discrimination, such as taxing a foreign national more harshly than a domestic national "in the same circumstances," and indirect discrimination, such as not allowing nonresidents to take the same deductions as residents.

But the nondiscrimination principle is formalized in different ways in bilateral tax treaties than it is in the E.C. Treaty. Additionally, courts in the E.U. and the U.S. don't interpret the principle the same way at all. National courts in the E.U. countries, Bennett said, have been more willing to look beyond the language of the law to determine whether the law affects noncitizens differently than citizens. American courts, on the other hand, have so far tended to look at the terms of the law alone. The result: inconsistent interpretations of the nondiscrimination principle across different jurisdictions, something Bennett sees as an intriguing challenge. "The topic interested me for a long time," she said, "largely because it's so baffling."

The Press: A Right to Be Wrong?



From left, panelists George Freeman, Professor Diane Zimmerman, Martin London and Madeleine Schachter.

The First Amendment right to free speech and a person's protection against defamation were debated—at times passionately—during "Freedom of the Press or License to Libel," the Law Alumni Association's Annual Fall Lecture. The panel discussion, moderated by Samuel Tilden Professor of Law Diane Zimmerman, focused on the public's growing reliance on upto-the-minute news, and measures that prevent libel, correct any misinformation and provide adequate retribution to parties that have been defamed.

To focus the debate, Zimmerman detailed a scenario in which a newspaper prints a story stating a retired judge placed violations on a piece of property in order to lower its price for her own benefit. The judge alleges that the article is incorrect and her image has been tarnished. The question:

Chris Quackenbush Remembered

Last spring, the Law School dedicated a portrait in memory of Chris Quackenbush '82, who died September 11, 2001, in the World Trade Center attacks. Quackenbush, a founding principal of Sandler O'Neill & Partners investment banking division, had a stellar career; his background included stints in mergers and acquisitions at Skadden, Arps, Slate, Meagher & Flom and at Merrill Lynch Capital Markets. A member of the Law School's Board of Trustees since 1998, he created the Jacob Marley Foundation, which supports programs for underprivileged children and endows a scholarship at the Law School. Quackenbush also served on the board of the University of North Carolina's Educational Foundation. His portrait now hangs in the John Sexton Student Forum in Furman Hall. Pictured in front of it are, from left, Thomas O'Brien, secretary and treasurer of the Jacob Marley Foundation; Carlton Brown, the foundation's president; Diana Holden, the foundation's executive director; and Quackenbush's widow, Traci.



Did the paper do the right thing in running the story if it later turned out to be false?

George Freeman, an assistant general counsel of the *New York Times* and adjunct professor of media law in NYU's journalism department, felt it did, pointing out that the media has to balance accuracy with timely news reporting. He said that a well-informed public trumps the feelings of public officials. If a story proves to be wrong, Freeman said, that can be remedied on the corrections page.

Freeman's approach struck Martin London '57, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, as inadequate; he considers the corrections page to be too little, too late. London argued that papers take too many risks on stories because they can afford to; courts have typically ruled in favor of the media. Still, London saw Freeman's larger point, conceding that "there is no question that breathing room is needed for the press," but cautioned that there is no value in defamation. Madeleine Schachter '82, vice president and deputy general counsel of the Hachette Book Group, also sought the middle ground: "Information is more important," she said. "Even if erroneous information is a part of it."



Attention For One Who Avoids It

This profile of Jeffrey Friedlander '70, by Joyce Purnick, appeared on December 19, 2005 in the New York Times.

his is for the quiet ones, the many men and women who make the city work by doing their jobs with little notice or acclaim while others compete for attention so easily (if fleetingly) won.

Last week, while the head of the transit union sneered at the public on camera; the governor campaigned for president, gun laws and the death penalty while punting on the transit talks; and the president went into televised defensive mode, Jeffrey D. Friedlander did what he usually does.

He worked in the city's Law Department on such matters as eminent domain and the next bond sale—with time out Thursday evening for a little-noticed City Hall ceremony where Mayor Michael R. Bloomberg and fans honored him for his service.

Mr. Friedlander, 58, is the city's first assistant corporation counsel, and has been with the city's law office for 35 years. He has worked under 6 mayors and 12 corporation counsels and today is second in command.

He supervises divisions, writes and reviews mayoral legislation, advises the mayor and city agencies, negotiates with the City Council, and is in charge when the corporation counsel is not around.

He could have left for more money, but here he is, still mastering the legal intricacies of subjects broad and diverse because this is New York, a "nation within a nation," as it says on a playful map from the 1939 World's Fair that hangs in Mr. Friedlander's impossibly neat office.

Some would find that daunting, almost as intimidating as advising mayors as different as David N. Dinkins and Rudolph W. Giuliani. Mr. Friedlander finds it energizing.

"At different junctures I've asked myself, are there legal issues more involved, more meaningful day in day out," he said in his Church Street office on Friday. "Is there a client more meaningful than the City of New York?"

His bosses are grateful that his answer has always been no. "I can say, 'Jeff, how do I solve this problem?' and I will quickly get the right answer, no ego, no politics," said the current corporation counsel, Michael A. Cardozo.

As Mr. Friedlander sees it, politics is not what distinguishes mayors. What does? In his soft murmur of a voice, he offered some discreet observations.

"Koch was the most open," he said. "You'd go into a meeting, he'd ask the youngest person a question, and he'd listen." Giuliani? "He had a more closed circle." Mr. Dinkins, whom he's known since his premayoral days? "A friend." Mayor Michael R. Bloomberg? "Different. But he does listen to advice."

"Mayors share more than they may realize," he added. "Regardless of who's mayor, education, public safety, social services, the budget—those are the issues. That's what the city is about."

Of the dizzying variety of subjects Mr. Friedlander has worked on—from gay rights and campaign finance reform to the emer-

Announces the Creation of an NYU School of Law LCBT Alumni Network.

The LCBT Network will:

- Create a greater sense of community among past and present LCBT Law School students
- ▶ Facilitate mentoring relationships and networking opportunities
- Provide a means for LCBT alumni to share their experiences with the law school community

If you are interested in joining the network, please email Karlis Kirsis '07, OUTLaw Alumni Outreach Chair at kpk245@nyu.edu



IN THE LIMELIGHT: Jeffrey Friedlander, assistant corporation counsel for New York City.

gency legislation needed after Sept. 11—his proudest accomplishment is drafting antiapartheid legislation in the 1980's, under which the city's largest public employee pension fund could divest itself of investments in companies doing business in South Africa.

Reforms in South Africa made it unnecessary, but he still considers it "one of the most meaningful things I ever did."

Mr. Friedlander, one of four brothers born to an insurance broker and an elementary public school teacher, grew up near Tompkins Square Park, developed a fascination for American history at Seward Park High School and pursued his interest at Hunter College.

At New York University School of Law, one of Mr. Friedlander's professors, who was also in the very job Mr. Friedlander has now, suggested that he apply to an honors program in his office. The student followed the advice of his mentor, Norman Redlich (a future corporation counsel), joined the city's Law Department right out of law school, and, professionally speaking, he was home.

Personally speaking, home is a brownstone in Boerum Hill that Mr. Friedlander shares with his wife, Marjory Karukin Friedlander, a librarian, and their daughter, Julia, a senior at Princeton. He is not all work. A trip to Burgundy awakened an interest in wines, he collects inkwells from the American Arts and Crafts period, and he is a deacon of the All Souls Unitarian Church in Manhattan.

Mr. Friedlander has, of course, thought of moving on, and knows he could earn much more with a private law firm than he does with the city (about \$180,000 a year). But he stayed, and sounds as if he will as long as he can, for the most basic of reasons: "I love being here."

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2006 Reunion

N ostalgia mingled with substantive discourse at the weekend's four panel discussions: "Guantánamo and the Rule of Law," which featured Adjunct Professor Donald Francis Donovan and Brennan Center Associate Counsel Aziz Huq and was moderated by Hiller Family Foundation Professor of Law David Golove; "Dealing with Talent: The Entertainment Lawyer at Work," with the participation of Craig Balsam '86, Thomas Tyrrell '71, Marvin Josephson '52 and L. Londell McMillan '90 and Dwight D. Opperman Professor of Law Samuel Estreicher as moderator; "The Supreme Court at a Crossroads," with panelists Matthew D. Brinckerhoff '90 and Chistopher J. Meade '96 joining moderator Burt Neuborne, the Inez Milholland Professor of Civil Liberties; and "Responding to Corporate Crime: Compliance and Enforcement in the Post-Enron Era," which featured Samuel Buell '92, Kathryn Reimann '82 and Walter Ricciardi '78 and was moderated by Norma Z. Paige Professor of Law Jennifer Arlen '86.

The festivities carried on into the night at the Waldorf, where catching up at dinner, music and the cha-cha were the only items left on the docket.

Law Alumni Association Awards

Jay Furman '71, The Vanderbilt Medal

George Lowy '55, Judge Edward Weinfeld Award

Joel Ehrenkranz '61 (LL.M. '63), Alumni Achievement Award

Jennifer Arlen '86, Legal Teaching Award

Steven Banks '81, Public Service Award

Vanita Gupta '01, Recent Graduate Award



 The entertainment law panel discussion featured, from left, moderator Professor Samuel Estreicher with L. Londell McMillan, Marvin Josephson, Thomas Tyrrell and Craig Balsam. (2) LL.M. graduates from 2001 enjoying their fifth-year reunion. (3) Vanderbilt Medal winner Jay Furman and his wife, Victoria Moran.
Maxroy Mitchell '96 and his wife, Tynetta. (5) Recent Graduate Award winner Vanita Gupta with guest Chinh Le. (6) The swinging dance floor at the Waldorf.

From Paris to the "Paris of the Americas"

As a preeminent international legal institution, the NYU School of Law has a growing community of alumni pursuing their livelihoods all over the globe. Each year, faculty members attending conferences or conducting work outside of the Big Apple serve as Law School ambassadors and catch up with alumni, as they did last year in Florence, Italy (Professors Samuel Estreicher and Richard Stewart), Chicago (Professor Estreicher), Cape Town, South Africa and Shanghai, China (Professor Eleanor Fox), Atlanta, Georgia and Monterrey, Mexico (Professor Barry Friedman) and Tel Aviv, Israel (Professor Joseph Weiler). Dean Richard Revesz also made trips to Paris, Geneva and Buenos Aires to greet prospective students and keep alumni informed of news from Washington Square.



Dean Revesz, center, with president of the NYU Club of France Laurence Rahmil (M.C.J. '96), fourth from left, and other guests at the Paris reception.



Dr. Willi Dietschi (M.C.J. '72), standing at left, president of NYU.CH, the Swiss alumni association, receives a gift of appreciation from Dean Revesz.



Olivier Dutheillet de Lamothe, member of the French Conseil d'Etat and justice at the French Constitutional Council, far left, with alumni in Paris.



Professor Ronald Noble, secretary general of Interpol, with Evelyne Fiechter-Widemann (M.C.J. '76), left, and Dr. Aleya El Bindari Hammad in Geneva.



Horacio Beccar-Varela Jr. (M.C.J. '56), left, with Julio C. Saguier (M.C.J. '88), president of La Nación, S.A., who hosted the reception in Buenos Aires.



Roxana Kahale (M.C.J. '90), left, with Juan Curutchet (LL.M. '92), center, and Michael Rattagan (M.C.J. '93) at the Buenos Aires reception.

Packing Power for Students on the Road

R aShelle Davis '07 was excited about spending a semester at the University of Amsterdam; only one thing could make the experience even better—connecting with an alumni mentor there. Davis, who is planning a career in international law, approached Dean Richard Revesz, the Office of Career Services and the Office of Alumni Relations for help. They not only found her a mentor—Thomas Buergenthal '60, a judge on the International Court of Justice (ICJ) in The Hague—but one who gave her a highly coveted internship, too. "Being at the ICJ was a great experience," says the AnBryce Scholar. "I actually got to sit in on the 2006 *Bosnia-Herzegovina v. Serbia-Montenegro* genocide hearings."

Davis's experience was the catalyst for Students on the Road, a new program that matches students abroad with alumni living in the area. "As much as we would like to, the faculty and I are unable to visit all of the places where we have alumni," says Revesz. "This program is designed to connect these accomplished people with one another, with our students and with the work the Law School is doing now." Next year, students traveling to 18 international destinations, including Ghana, Argentina and Estonia, will plug into this powerful network in order to generate the most memorable and worthwhile experiences possible.

A Firefighter and a Trailblazer

For 24 years, FDNY Captain Brenda Berkman has been proving courage is gender neutral.

S hunning lawyerly business suits to don the blue uniform of the New York Fire Department—as a woman, no less— Brenda Berkman '78 knows what it means to follow Robert Frost's proverbial road less traveled. "I knew I was in for a struggle, but I'm the eternal optimist. Maybe it's that midwestern thing," says the native Minnesotan.

A no-nonsense woman with the lean physique of the former marathon runner she is, a penetrating gaze and a surprisingly quiet and low voice, Berkman, 54, was the main subject of *Taking the Heat: The First Women Firefighters of New York City*, a documentary narrated by Susan Sarandon that conveys the isolation, harassment and danger these pioneering women endured. The film had its world premiere at Tishman Hall last February, and later aired on PBS.

The facts are that in late 1977, about 500 women signed up for the first NYC firefighter entrance exam that wasn't restricted to men. Of those who passed the written test, 89 continued to the physical one. All of them, including Berkman, failed. In 1979, Berkman filed a highly publicized, lengthy and contentious lawsuit that challenged the exam's validity. A federal judge in 1982 upheld Berkman's claims—that the feats required in the physical exam weren't essential to fire fighting and discriminated against women—and a new exam and training program were ordered. Later that year, Berkman joined the fire academy's first class of 47 women trainees.

But the real battle was just beginning. The women were routinely harassed. One particularly dangerous act was to drain the women's air tanks so that when they were called to a fire they either had to run in without oxygen or be considered cowards. The women were shut out of meals and were subjected to obscenities, verbal abuse, physical violence, sexual molestation and even death threats from other firefighters. "Not all men participated in the harassment," Berkman says. However, those men who stood up to defend the women became targets themselves.

"There was a lot of opposition to having women in the firehouse," says Berkman's attorney, Clinical Professor of Law Laura Sager, who was then the director of the Women's Rights Clinic at NYU School of Law. "It was a guys' club." In many ways, fire fighting still is. "There is still a misogynist climate that goes on in fire departments all over the world because some people still believe that this is a man's job," Berkman says. Indeed, Berkman has earned two promotions by virtue of passing exams. Now as captain of Engine 239 in Brooklyn, she is the first to rush into a burning building. "Any firefighters who say they have never been frightened at an incident are either lying or crazy," she says.

She has earned a measure of respect and has "a very good relationship" with her allmale engine company, she says, while noting nomics; she liked math but was discouraged by a teacher. She irked high school authorities by organizing forums for voters to quiz school board candidates. "I thought that kids should have some say in what kinds of things they could pursue," she says.

Berkman graduated summa cum laude from St. Olaf College in Northfield, Minnesota, then in 1975 earned her M.A. in history from Indiana University, where she met her now ex-husband, Kenneth Gordon, and moved to New York. She attended the NYU School of Law while working at her father-inlaw's law firm—whose client roster included the Uniformed Fire Officers Association. It was in part getting to know the fire officers



A HERO'S WELCOME: Berkman returned to the NYU School of Law last February for the world premiere of a documentary about New York City's women firefighters. She is seen here in a still from that film.

that working with another woman would be a plus. "But I'm so far along in my career. I'm not going to spend my last few years agonizing about whether I'd like to be a lot happier. I'm taking it for what it is, right now."

Young women firefighters are grateful to Berkman for paving the way. "I don't think a lot of us would have the courage to do this job if it weren't for Brenda," says Regina Wilson, 37, who joined the force in 1999. Berkman's efforts have not only enabled women to work side by side with men, says Wilson, but have led to even small improvements that loom large in the everyday life of a firefighter, like "having shoes and shirts that fit, female bathrooms in the firehouse and lingo that is gender friendly."

Even as a child, Berkman challenged the status quo. "One of my earliest memories is of trying to get into the [then-boys-only] Little League," she says. At school, she wanted to take shop, but was forced to study home ecothrough her job that piqued her interest in joining the FDNY.

Almost 25 years after her victory, however, what rankles her most is how tenuous the hard-fought gains have been. "After 9/11 the buzzword was 'the brothers," says Captain Peter Gorman, president of the Uniformed Fire Officers Association. In the six months after 9/11, the FDNY hired just one woman among more than 600 recruits, and today just 29 of the city's nearly 11,500 firefighters are women. Gorman agrees with Berkman that the city doesn't do enough to recruit women or minorities. He notes that the city rarely uses women in their promotional efforts.

"I am proud that I challenged and continue to challenge the fire service for the benefit of women and the larger community," Berkman says. "Being forced to conform to narrow stereotypes of what you can and can't do with your life, that hurts men as much as women."

The Right Place at the Right Time

A breathtaking view of the Golden Gate Bridge, a perch over the shimmering waters of Marina del Rey or the promise of genuine Southern hospitality were some of the added attractions for Law School guests as they caught up with one another at receptions in seven U.S. cities. Trustee Sloan Lindemann Barnett '93 in San Francisco, Richard Marmaro '75 in Los Angeles and William Brewer III (LL.M. '78) in Dallas graciously opened their beautiful homes to alumni, faculty and admitted and prospective students. In addition, other generous hosts included Paul Berger '57 in Washington, D.C., Joseph Collins '75 in Chicago, Chris Compton '68 in Palo Alto and Lawrence Green '77 in Boston. They all invited Law School alumni to cocktails, and encouraged their guests to mix, mingle and keep up with the latest news emanating from Vanderbilt Hall.



Another First for Fox

Law Women announces Alumna of the Year award



Professor Fox proudly displays her award alongside students Elise Roecker, left, and Carolyn Walther '07.

aw Women honored Professor Eleanor Fox '61 with its first Alumna of the Year Award at their Alumnae Reception last March, in recognition of the many ways in which she has led the way for female attorneys. In a warm and well-received speech, Fox, the Walter J. Derenberg Professor of Trade Regulation, who teaches Antitrust Law, International and Comparative Competition Policy, European Union Law and Torts, briefly sketched her long and distinguished career. She recalled that when she went to work for the U.S. attorney's office in the 1960s, it was believed that women shouldn't "get their hands dirty," so she was placed in the civil division, not the criminal one. Fox followed her philosophy of doing her best possible work no matter the circumstances, however, and that led her to become the first female partner at a major Wall Street firm, Simpson Thacher & Bartlett. "It never was suspected I would be a partner," said Fox, by way of explaining how she eventually became one: through quiet, unassuming diligence.

As Elise Roecker '07, cochair of Law Women, observed in her introductory remarks, Fox's impact has been far-reaching. "It is safe to say she has broken open antitrust law," said Roecker, noting that Fox has advised two presidents, Clinton and Carter (for the latter, she served as commissioner of the National Commission for the Review of Antitrust Laws and Procedures); several countries including South Africa, Indonesia and Russia; and the European Union. In her speech, Fox emphasized the importance of finding mentors, naming several inspirational female faculty members in the audience, including Sylvia Law '68 and Linda Silberman. But mentors can be men, too. "I had the good fortune of having a person or two blaze a path for me," she said, adding that former dean Norman Redlich (LL.M. '55) had appointed Fox an associate dean in charge of the J.D. division from 1987 to 1990; to date, Fox is the only woman to have held that position.

Breaking barriers has been a way of life for Fox. Among her many posts, she has served as the first female chair of both the New York State Bar Antitrust Law Section and the Section on Antitrust and Economic Regulation of the Association of American Law Schools, and as the first female vice chair of the ABA Antitrust Section.

Fox has made "extraordinary contributions to the legal world," said Roecker, and it is important "to pay tribute to her humanity in an all-too-often cold profession." That humanity is something Fox relishes. In addition to her books on antitrust and European Union law, mergers and central European competition policy, she has written a comic novel, W.L., Esquire (Marando Press, 1977), about women in the maledominated legal profession. Fox clears time in her busy schedule to have lunch with her 1Ls, and goes above and beyond to keep her students engaged in the classroom. Every year she recites a poem she wrote about Benjamin Cardozo's opinion in Palsgraf v. Long Island Railroad Co. and proximate cause. Said Roecker: "I can tell you my class, at least, applauded." The assembled guests responded to Fox the same way.

Lawrence P. King Room Dedicated

Family and friends gathered last September to dedicate a Vanderbilt Hall classroom in honor of Lawrence P. King. The room was decorated with mementos including King's Sir Harold Acton medal and a student cartoon of the professor in action. Dean Richard Revesz, the Lawrence P. King Professor of Law, talked about King's four decades on the faculty and his "tremendous passion" for bankruptcy law, a field in which King was considered the expert. He introduced Leonard Rosen '54, a longtime friend and colleague, who spoke of King's "passion for the law, what it is and what it should be." Among King's accomplishments was his founding of the Lawrence P. King and Charles Seligson Workshop on Bankruptcy and Business Reorganization.



Dean Richard Revesz, left, Leonard Rosen and Denis Cronin converse in the King Room.

Making the Grade

New York University

A MATTER OF DEGREE: Jenny Xiao Ling Huang accepts a Law School diploma on behalf of the J.D. Class of 2006 at the 174th University Commencement on May 11. At the ceremony, NYU President John Sexton bestowed honorary degrees on Mikhail Baryshnikov, Supreme Court Justice Anthony Kennedy, Xerox Chairman and CEO Anne Marie Mulcahy, French novelist Alain Robbe-Grillet and civic leader Wilma Stein Tisch. Beverly Sills and Law School alumna Rita E. Hauser also received awards.

"The World Could Use You Now More Than Ever"

peaking frankly about the great responsibilities of leadership today, former executive director of UNICEF Carol Bellamy '68, now president and CEO of World Learning, an organization that promotes international understanding, addressed this year's graduating class. She urged the graduates to think of themselves not only as lawyers, but as leaders-a profound difference, she said-adding that lawyers have the tools necessary to take charge. "You have a thorough understanding of the law and how it applies to the real world, [you] can truly have a permanent and lasting effect on all of mankind." She listed many injustices around the world: "Poverty, HIV/AIDS, disease, abuse and genocide are too complex to be solved by government and educators alone. We need your leadership." Bellamy added, "It's a privilege" to have graduated from the NYU School of Law. "Honor it and be proud."

Reflecting on an academic year that began with the devastating hurricanes along the Gulf Coast, Dean Richard Revesz spoke of his pride in the humanity of the graduating class. "I was deeply impressed by our students' responses," Revesz said. "You set up fundraising efforts and clothing drives, and arranged legal assistance for those displaced by the devastation." And he offered a parting wish: "My hope is that you combine your newly acquired knowledge with your passions; that you use what you have learned to take a stand with reason and integrity as well as conviction."

Two students who exemplify Revesz's ideal are Brandon Buskey and Alexander Dmitrenko, J.D. and LL.M. candidates respectively, who spoke on behalf of the class of 2006. Both delivered unique perspectives on their Law School careers.

"The law cannot help people," said Buskey, a Root-Tilden-Kern and an AnBryce scholar who was raised in Fayetteville, North Carolina. "But people who know the law can help people." In a crowd-pleasing, funny and personally reflective speech, Buskey described how in his first year, Professor Bryan Stevenson's admonition to "find your own place in the law" led him to focus on public interest law and criminal justice by taking Professor Randy Hertz's Juvenile/Criminal Defense Clinic and becoming a board member of Law Students Against the Death Penalty. He will continue to follow this path in 2006-07, when he serves as a clerk for the Honorable Janet C. Hall '73 of the U.S. District Court of Connecticut prior to joining Stevenson's Equal Justice Initiative of Alabama the following year.



Dmitrenko's road to the Law School was quite different from Buskey's, with his having grown up in what was then the Soviet Union and graduating magna cum laude from Rostov State University Faculty of Law in Russia. He also earned two previous international LL.M. degrees, in Budapest and Toronto, before receiving his tax LL.M. from the Graduate Tax Program at NYU. "Having grown up in a Communist household, it was the rebel in me that wanted to come to the 'cradle of capitalism'-New York City," Dmitrenko said in his remarks, which included thank-yous in eight languages. A prime example of "the global lawyer," at 28 years of age Dmitrenko has already contributed to international taxation and constitutional law in places like Kazakhstan, Kyrgyzstan and Russia, as well as landmark rulings concerning same-sex marriage in Canada. He will start as a tax associate at Dewey Ballantine in the fall.

Before the conclusion of the ceremony, Lester Pollack '57, chairman of the NYU School of Law Board of Trustees, introduced Daniel Blaser and Elida Kamine, who presented a \$78,000 gift from the class of 2006, helping to ensure that future law students have the same opportunities for leadership and community that they had.





Profiles

Heather Childs

Students will often credit professors with inspiring in them a whole new view of their future. For Heather Childs, lightning struck after taking Professor Noah Feldman's The Administrative and Regulatory State course and attending a conference on global administrative law organized by Professors Richard Stewart and Benedict Kingsbury.

"Everyone sees administrative law as boring, but it's something I find fascinating as a conceptual matter," says Childs. "It's what tied law school together for me and is something I never would have expected."

Unexpected to others, as well, is Childs's other passion: dance. Through a nonprofit group called House of the Roses, she puts her lifetime of dancing to use teaching New York City homeless children her craft.

After graduating, Childs will clerk for Judge Emilio Garza of the U.S. Court of Appeals for the Fifth Circuit in San Antonio, in her home state of Texas. A note she wrote on American, European and global administrative law will also be published in the *Journal of International Law and Politics*. Childs is considering a Ph.D. in history, with a concentration on American administrative law and due process, leading to a possible career in academia.

Soon enough it may be Childs's turn to inspire future law students. ■

Commencement

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America is not just a place. America is an idea—the idea of freedom. Hundreds of millions around the world are watching us to see if freedom works. And they are skeptical. The verdict is out.

Anthony M. Kennedy Associate Justice, Supreme Court of the United States, Doctor of Laws recipient











Thomas Leith

n Paris, where he was living and working as a jazz and funk drummer, Thomas Leith found himself absorbed by old Supreme Court decisions, such as one reaffirming the constitutional status of the Miranda ruling, when a friend said, "You realize that normal people don't read entire Supreme Court transcripts?"

That comment led Leith, who at the age of 31 was planning a career change, to apply to law school. But what confirmed for him that law was the right choice was his experience in the Federal Defender's Clinic.

With three other clinic students, Leith represented an ambulance driver accused of disorderly conduct. "Students are only allowed to do petty offenses," says Leith of the case. "But it's not petty to the defendant."

Weeks of preparation, including reviewing testimony and dissecting a surveillance video, led to Leith presenting evidence and crossexamining witnesses during a seven-hour trial, at which Leith's client was acquitted.

"After you get to know your client and his story, you get really invested for the sake of the defendant," says Leith. "We were scared to death of letting him down."

Leith observes that performing in a band onstage has many similarities to arguing in a courtroom before a judge and jury. His next gig? Working as an associate in the litigation department of Sidley Austin.

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In recognition of her outstanding professional achievements, her hard work in helping secure a more peaceful world, her visionary philanthropic legacy and her unwavering devotion to this institution....

Dean Richard Revesz, introducing Rita E. Hauser, who was presented the Albert Gallatin Medal by President John Sexton and Chairman of the Board of Trustees Martin Lipton



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The very concept of New York City and the life of our university stand as a rebuke to those who say that balkanization and fragmentation is inevitable. In your years here you have lived in a community that foreshadows the best of the world to come.



President John Sexton, speaking to the Class of 2006



Lais Washington

summer internship in sunny Palo Alto, California, revealed to Lais Washington that corporate law just didn't suit her.

Spending weeks in the lovely glass-walled offices of Morrison & Foerster handling intellectual property cases, Washington kept thinking about her previous summer position in nearby Oakland, where she had been exhilarated by hitting the streets to canvas voters and rolling up her sleeves to draft the language in a ballot measure to legalize medical marijuana.

"I had my own office and secretary," says Washington of her Silicon Valley setup. "But it just felt wrong to me since I'd never so much as had my own desk or computer on a regular basis."

Instead, Washington, a Root-Tilden-Kern scholar, has found a better fit in New York. After graduation, she will work as a prosecutor in the Manhattan District Attorney's office under the legendary Robert Morgenthau. By taking this position, she hopes to help lead the way for others, especially women of color, to consider prosecutorial work.

Washington's aspirations include returning to NYU. "I'm hoping it's not too far off that I'll come back to talk in the Leaders in Public Interest Series," says Washington. "It would be great to walk into Vanderbilt as an attorney to share what I've learned."



Convocation Kudos

Proud relations and scholarship donors celebrate with graduates of the Class of 2006 and share in the joy and honor of attaining degrees from the New York University School of Law.











































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Who's Who

- 1. Ari S. Bassin with his father, Steven Bassin '66
- 2. Daniel Blaser, chair of the 2006 Class Gift Committee, with his father, Dr. Martin J. Blaser
- Katherine A. Brodsky with her father, Daniel J. Brodsky
- Jared Bybee with his wife, Mehrsa Baradaran '05, and their daughter, Cyra Baradaran-Bybee
- 5. Lesley Anne Coben with her father, Jerry Coben '69
- Arielle Cohen with her parents, Naomi Weintraub Cohen '68 and Harvey Cohen '68
- Alexander Dmitrenko (LL.M.) with his cousin Marsha Metrinko, NYU School of Law Director of Development
- Adam David Greenwood with his uncle Ken Greenwood '82
- 9. Joshua W. Heideman with his cousin Ron Tzadik '03

- 10. Benjamin T. Huebner with his mother-in-law, Barbara H. Dildine '74, and his father-in-law, Peter A. Norling '74
- Alonso Indacochea Pardo de Zela (LL.M.) with his father, Ricardo Indacochea (M.C.J. '77)
- 12. Douglas B. Heitner with his father, Kenneth Heitner '73 (LL.M. '77)
- Sophi K. Jacobs with her father, Professor James Jacobs
- Dena C. Kesselman with her sister Michelle Kesselman Sadowsky '00
- 15. Scott Malagold with his brother David Malagold '01
- Kenneth Mantel with his parents, Joan Licht Mantel '75 and Arthur Mantel '70
- 17. Ian McGinley with his father, Patrick W. McGinley (LL.M. '71)
- Solomon Michael Oliver with his father, Solomon Oliver Jr. '72

- 19. Gregory M. Perry with his father, Law School Trustee Wayne Perry (LL.M. '76)
- 20. Donald Theodore Rave III with his grandfather Donald Theodore Rave (LL.B. '56)
- 21. Annette C. Rosskopf (LL.M.) with her fiancé, Tobias Eberl (LL.M. '05)
- 22. Jacob Sasson with his twin brother, Joseph Sasson '05
- 23. Gina S. Spiegelman with her aunt Professor Helen Hershkoff
- 24. Elizabeth Jane Sudler with her parents, Eileen FitzGerald Sudler '74, chair of the Dean's Strategic Council, and Peter Sudler '73, Law School trustee
- 25. David L. Tisch with his father, University Trustee Daniel Tisch
- William J. Wailand with his parents, Adele Wailand '73 and George Wailand '72

- 27. Audrey Weissberg (LL.M.) with her father, Kenneth Weissberg (LL.M. '80)
- 28. Katherine H. Worden with her mother, Virginia Worden '75
- 29. Katharine M. Zandy with her father, John Zandy (LL.M. '76)
- 30. Shira J. Zatcoff with her uncle Michael J. Widman '86

Scholars and Donors

- Deborah Rachel Linfield Fellow Anne N. Arkush was hooded by Trudy Linfield.
- AnBryce Scholar Brandon J. Buskey was hooded by Law School Trustee Anthony Welters '77 and Beatrice Welters.
- Alex E. Weinberg Fellow Andrew F. Gordon (LL.M.) was hooded by Kenneth Heitner '73 (LL.M. '77).
- M. Carr Ferguson Fellow Andrew L. Grossman was hooded by Law School Trustee M. Carr Ferguson (LL.M. '60).

- Sullivan & Cromwell Public Interest Scholar Adam J. Heintz was hooded by Law School Trustee Kenneth M. Raisler '76.
- William & Mary Sterling Scholar Miranda B. Johnson was hooded by William C. Sterling Jr. '59 and Mary B. Sterling.
- 37. KPMG Scholar William R. Johnson (LL.M.) was hooded by Lawrence Pollack (LL.M. '88).
- Wilmer Cutler Pickering Hale/Dorr Root-Tilden-Kern Scholar Lais S. Washington was hooded by C. Hall Swaim '64.

Not Photographed:

Law School Trustee Jay M. Furman '71 hooded Furman Academic Fellows: Elizabeth C. Arens Jenny L. Huang Michael A. Livermore Jeremy C. Marwell Joy E. Milligan Kathleen Marie O'Neill Donald Theodore Rave III

Making the Grade photographs by Leo Sorel

A Chat with Simon Chesterman

imon Chesterman, former executive director of the Institute for International Law and Justice, is the new director of the Singapore Program. The dualdegree LL.M. program, conducted with the National University of Singapore, will matriculate its first class in May 2007. Chesterman is an expert on international law and the U.N. who has lived or worked in Afghanistan, China, Rwanda and Serbia. A native Australian, he spoke with senior writer Graham Reed about heading back East.

Why is the new LL.M. program in Singapore? Singapore presents the best gateway to Asia, which, economically, is incredibly globalized, but legally, in terms of international institutions, is not. There's a great deal of readiness to practice law across jurisdictions



but not yet to study law across jurisdictions. Together with the National University of Singapore Faculty of Law, we hope to be part of a transformation in that way of thinking.

The program offers a specialization in justice and human rights. Will that be a challenge in a country known to be strict? Yes, but I don't think it will be a danger. One of the things we're hoping will come out of this is a twoway conversation—that Singaporeans and other people in this program learn something from the Americans and the faculty who go over there, and that it's just as conceivable that we learn something from them.

You've been critical of the secretary-general and the United Nations, but honestly, is the U.N. just an unattainable ideal? The real problem is mismatched expectations. Is the U.N. an organization that does things or is it a diplomatic conference where member states get together and agree or disagree on shared policies? The answer is, of course, that it's both. But the confusion between those functions leads to disappointment. The U.N. can never be everything to everyone. To quote former Secretary-General Dag Hammarskjöld, the U.N. was not created in order to bring us to heaven, but to save us from hell.

What will you miss most about New York? The multicultural lifestyle, the people who are passing through town and the fact that for my line of work, the U.N. is right around the corner. There's also Broadway, restaurants and so on. But with a one and a half year old child, my wife and I realized that we don't actually do many of these things. We'll miss the theory rather than the practice. Your wife, Ming Tan, is Singaporean. How did you meet? We met getting our Ph.D.s at Oxford, then she moved to Singapore and I moved to New York via Yugoslavia. While I was doing research on East Timor, my thenboss allowed me to route each of my trips through Singapore with a week of leave. I eventually persuaded Ming to marry me and move to New York.

What will she do after your move? She runs a corporate foundation where her boss is Singaporean. She will move jobs within the organization and be based out of Singapore, so it works very well.

Are you and Ming looking forward to raising a child in Singapore? We're raising him to be bilingual in English and Chinese. That's going to be even easier in Singapore. In particular, having a family network will be useful. We'll have grandparents who are keen on spoiling our child rotten.

Who spoils children worse, Australian or Singaporean grandparents? In terms of toys, he's in a bidding war between both sets at the moment. The difference is best summarized not by grandparents, but by people you meet on the street. Our son was born very large and he's got a nice healthy belly. In Australia, people will be amused and rub his belly and call him a little Buddha. In Singapore, old people will pass us on the street and say, he's not eating enough.

In 2005, the Melbourne newspaper *The Age* listed you as one of "50 Australians Who Matter" along with Germaine Greer, Rupert Murdoch and Dame Edna. Are you mobbed by adoring fans when you go home? Mercifully, no. It was an enormous compliment, not least because of the category I was included in, "Stirrers," a wonderfully Australian slang term meaning those who challenge authority or speak truth to power.

You are aware that Hugh Jackman was just a runner-up? I'll now think twice about sending a copy to my mother.

What do you like to do when you're not thinking about peacekeeping and nation-building? I enjoy playing with my son, teaching him new words and how to walk, things like that. I run, travel, read. I write. When I was at Oxford, I wrote a play.

What's it about? It's about 50 minutes long.





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I see on a daily basis what your support does—for individual students, who are part of our community only because of your generosity; for graduates who contact me directly, overjoyed that our loan repayment assistance program has enabled them to continue working in the public-interest sector; and, for people around the country and the world who are touched by the myriad efforts of our faculty. None of this would be possible without the dollars we get from you, our alumni. I want to extend my heartfelt gratitude to all of you who regularly give to our Law School, and to those of you who will pick up the phone or log on to the Internet to give for the first time today. We promise to use your gifts wisely.



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