

The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW • AUTUMN 2008

GOOD FROM EVIL

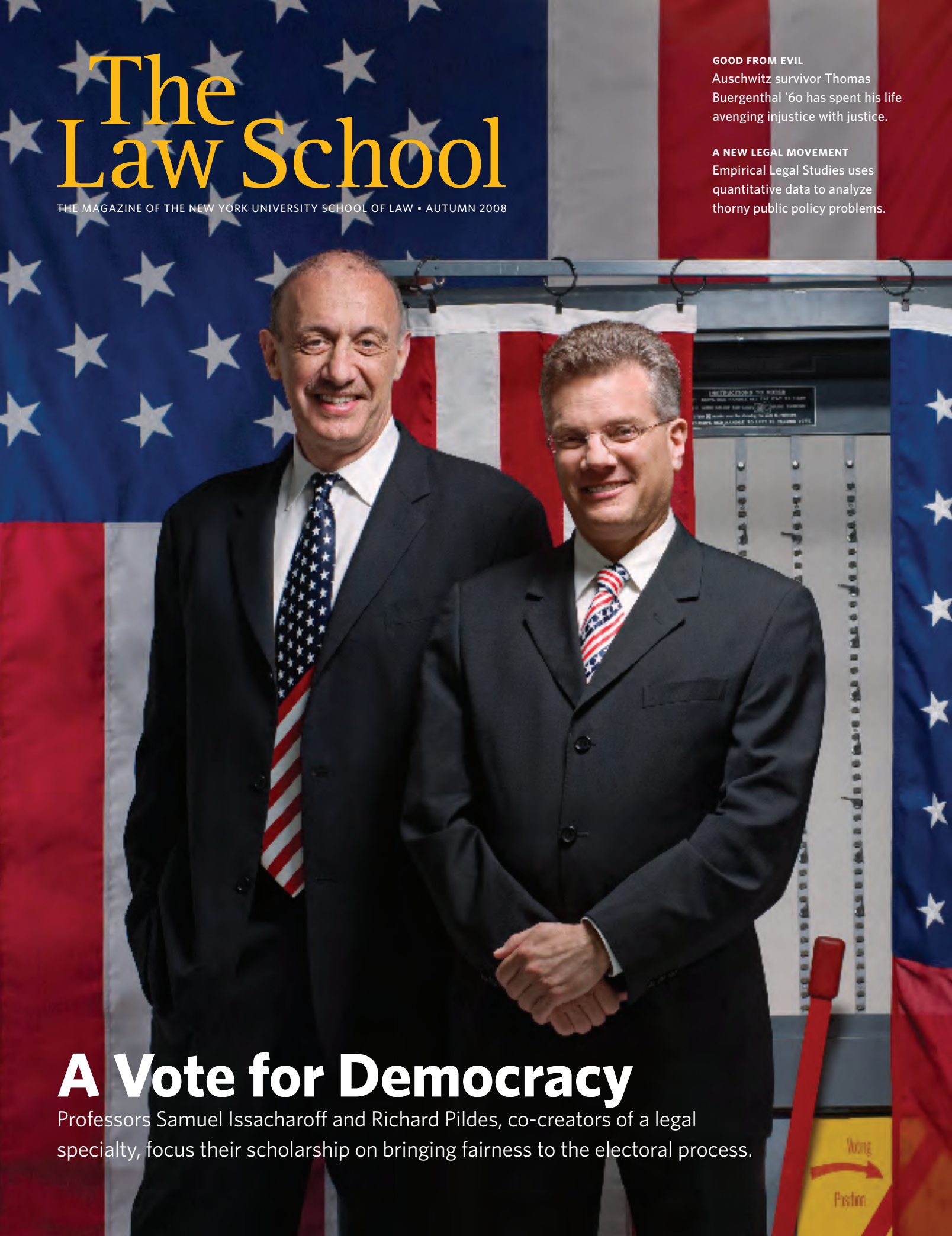
Auschwitz survivor Thomas Buerghenthal '60 has spent his life avenging injustice with justice.

A NEW LEGAL MOVEMENT

Empirical Legal Studies uses quantitative data to analyze thorny public policy problems.

A Vote for Democracy

Professors Samuel Issacharoff and Richard Pildes, co-creators of a legal specialty, focus their scholarship on bringing fairness to the electoral process.

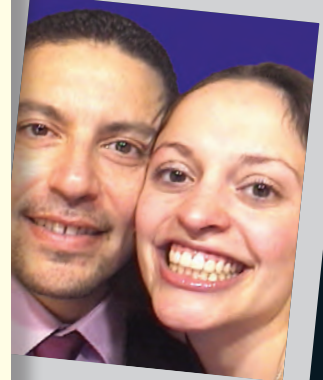
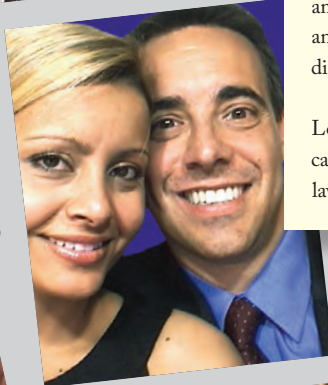


SAVE THE DATE!
APRIL 4, 2009

WERE YOU IN THE CLASS OF
1954, 1959, 1964, 1969, 1974, 1979,
1984, 1989, 1994, 1999 OR 2004?

Whether you are returning for your fifth, 25th, 50th or your 55th reunion this spring, the Law School community looks forward to welcoming you back to Washington Square. Reunion is an opportunity to relive favorite memories, renew friendships and reconnect with the intellectual excitement you felt as an NYU School of Law student. On Saturday, April 4, all returning alumni will be able to spend the morning at our thought-provoking academic panels featuring esteemed faculty and distinguished alumni, enjoy the annual alumni awards luncheon that follows, and cap it all off at an elegant and festive dinner dance with classmates.

Look for your invitation in the mail. Please call (212) 998-6470 or send us an email at law.reunion@nyu.edu with any questions.



A Message from Dean Revesz

WE HAVE A TREMENDOUS ISSUE HERE! I AM DELIGHTED TO BE ABLE TO PRESENT YOU with a timely cover story that will shed light on the intersection between law and politics as we come into the final stretch of the 2008 presidential race. Two of our faculty, Samuel Issacharoff, the Bonnie and Richard Reiss Professor of Constitutional Law, and Richard Pildes, the Sudler Family Professor of Constitutional Law, along with their

colleague Pamela Karlan, a professor at Stanford Law School, are the co-creators of a legal field called the Law of Democracy.

The groundbreaking case-book they published in 1998, *The Law of Democracy: Legal Structure of the Political Process*, has transformed the way scholars view election law. Defining the cluster of legal issues underpinning the practice and theory of American democracy, their work turned diffuse areas of the law into a coherent discipline—one that is quite popular among law students.

As you may know, each year we highlight an academic area that we are confident a peer review would say is the strongest of its kind among the top law schools. This year that area is the Law of Democracy. Larry Reibstein, the formidable journalist who wrote about Law and Philosophy for the magazine in 2005, explores this new legal specialty in “Leveling the Playing Field” on page 18.

As you’ll discover in our story “Follow the Numbers” on page 28, Jennifer Arlen ’86, Norma Z. Paige Professor of Law, and Geoffrey Miller, Stuyvesant P. Comfort Professor of Law, are also blazing new trails in the burgeoning area of Empirical Legal Studies, known as ELS. Along with almost two dozen members of the faculty, including Professors Lily Batchelder in tax and social policy, Marcel Kahan in corporate law and Stephen Choi in securities law, Arlen and Miller have been publishing real-world, data-driven research that illuminates a range of public policy matters, and have made NYU Law a locus of ELS activity.

It’s hard to understand why Thomas Buergenthal ’60, who received an honorary doctorate during our most recent commencement ceremonies, isn’t a household name. Turn to the remarkable story, “From Darkness,” on page 10, and you will see Buergenthal’s early life was the stuff of nightmares; he was one of the few children to survive the Auschwitz Death March. A judge on the International Court of Justice, and a



past judge on and president of the Inter-American Court of Human Rights, Buergenthal has made profound contributions to the cause of human rights. In fact, as the magazine was going to press, he was one of two recipients of the Gruber Foundation International Justice Prize, a \$500,000 award honoring those who advance the cause of justice through the legal system.

On a lighter note: Did you know that Professor Roderick Hills Jr. had to find a new home for Reflector, his horse, before coming to NYU? Turn to page 46 to learn more about the 27 enormously accomplished academics who have joined our full-time faculty since 2002. I am also quite proud of all our faculty, and delighted to welcome six new members, whose profiles begin on page 40.

This was a great year for student scholarship. An article

that Brian Frye ’05 began as a third year, published in the *NYU Journal of Law & Liberty*, was cited in Supreme Court Justice Antonin Scalia’s majority opinion in *District of Columbia v. Heller*. And a paper that Sima Gandhi ’07 (LL.M. ’10) wrote for Batchelder’s tax and social policy seminar won the Brookings Institution’s inaugural Hamilton Project Economic Policy Innovation Prize. To read more about students’ achievements, please turn to page 73.

Finally, we are privileged to have so many active and thoughtful alumni. Don’t miss our back page piece about the new president of Taiwan, Ma Ying-jeou (LL.M. ’76), who is married to Chow Mei-ching (LL.M. ’76). The interview was conducted by Law School Professor Jerome Cohen, who taught Ma at Harvard in the 1970s. And many thanks to an alumnus who sent an email last year suggesting that *The Law School* could improve its environmental practices.

This issue is our first printed on paper containing 30 percent post-consumer recycled fiber; as the quality of recycled paper continues to improve, that percentage will increase. So, enjoy, and when you’re finished reading these pages, please be sure to recycle the magazine!

RICHARD REVESZ

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THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW • AUTUMN 2008



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becomes the first AnBryce Scholar to have clerked on the Supreme Court; Ronald Dworkin awarded the Holberg Prize; Immigrant Rights Clinic triumphs in long-fought deportation case.

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67 GOOD READS

A list of all the work published in 2007 by full-time faculty. Plus, excerpts from recent books by Professor William Nelson, Dean Richard Revesz and coauthor Michael Livermore '06, and others.



73 Student Spotlight

An economic policy paper by Sima Gandhi '07 (LL.M. '10) wins the Hamilton Project prize; Reena Arora '08 aids immigrant detainees and gets public service award; students spend spring break providing free legal services to needy Newark residents.

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Taiwan's new president, Ma Ying-jeou (LL.M. '76), shares his plans for his country and tells how NYU shaped him.



INTERNATIONAL



ENVIRONMENTAL



CRIMINAL



LEGAL PHILOSOPHY



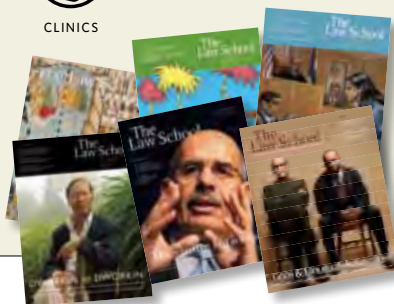
CIVIL PROCEDURE



CLINICS

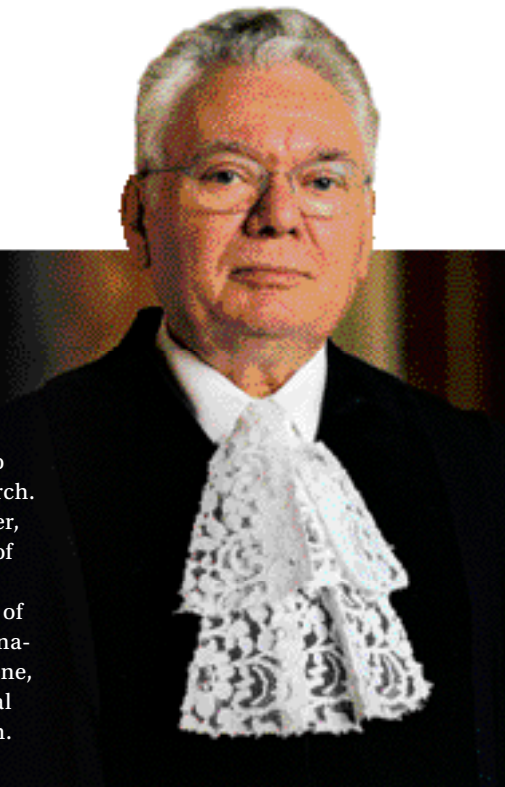
Topic Updates

This year we spotlight the Law of Democracy. In each of the last six years, the magazine has showcased an area of law in which we believe a peer review would determine that NYU School of Law has the strongest program among top schools. News on past feature subjects—international, environmental and criminal law, legal philosophy, civil procedure and clinics—is marked with the “update” icons pictured here.



10 The Light of Reason

As a child, Thomas Buergenthal '60 survived the Auschwitz Death March. Now, more than a half-century later, he sits on the International Court of Justice at The Hague. How is it that someone who saw the darkest side of mankind, at a time when the international community failed to intervene, remains devoted to advancing legal concepts of human rights? Read on.



18 And Justice for All

NYU Law's Samuel Issacharoff and Richard Pildes are cofounders of a young, cool legal field called the Law of Democracy. Weighing in on issues such as voting rights, campaign finance and gerrymandering, their work is especially critical as we enter the final months of the 2008 presidential election. Here, we take a close look at the intersection of law and government.



28 Tracking the Numbers

Professors Jennifer Arlen '86 and Geoffrey Miller, along with nearly two dozen other faculty members, are at the center of a new legal movement, Empirical Legal Studies. Also called ELS, it relies on hard data to shed light on pressing, real-world problems. Whether it's analyzing voter identification fraud or assessing the role of race in sentencing, ELS is starting to make an impact.



Notes & Renderings



Alston Gives U.N. Mission Report

AFTER RETURNING FROM A HUMAN RIGHTS MISSION FOR the United Nations, John Norton Pomeroy Professor of Law Philip Alston sharply criticized the U.S. judicial system for how the government applies the death penalty in Texas and Alabama, and how “enemy combatants” held at Guantánamo Bay prison are prosecuted.

As the U.N. Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston assessed whether due-process guarantees were being honored in death penalty cases in the U.S. After meeting with officials from the Departments of State, Justice, Defense and Homeland Security, Alston—a director of the Center for Human Rights and Global Justice—called for immediate reform. “There needs to be full accountability,” he said at a June press conference.

Six Guantánamo prisoners have been charged with capital offenses under what Alston called the “deeply flawed” Military Commissions Act of 2006. Alston said access to counsel is severely limited, and hearsay evidence is permissible. At least one of the six was subjected to waterboarding, yet coerced statements are admissible. “These trials should be aborted,” he said.

Alston also had harsh words for Texas, with the highest number of U.S. executions and death-row prisoners, and Alabama, with the highest per-capita rate of U.S. executions. He said the fact that 129 death-row inmates have been exonerated should be “an enormous wakeup call,” and he recommended repealing an Alabama law that allows judges unrestricted authority to override jury verdicts. “It’s possible that Alabama has already executed innocent people,” said Alston, “but officials would rather deny that than confront flaws in the criminal justice system.”

Bad Ballots

A study by the Brennan Center for Justice found that eight years after the butterfly-ballot debacle in Florida, the U.S. electoral system continues to be plagued by ballots with poor visual organization, confusing instructions and other problems. Released in July, the study, “Better Ballots,” concluded that despite billions spent on new voting systems, poorly designed ballots have led voters to skip over key races or make mistakes that invalidated their votes, and hundreds of thousands of voters have been effectively disenfranchised during the last several federal elections. Design flaws in ballots could play an even bigger role in November, with many new voters expected to come to the polls, Lawrence Norden, director of the Brennan Center’s Voting Technology Assessment Project, told *The New York Times*.

Security for Social Security

John Infranca ’08 has won a \$30,000 grant from the National Academy of Social Insurance, and will write a paper on enforcing existing laws protecting Social Security benefits from creditors when funds are held in bank accounts. Infranca’s project is part of a program funded by the Rockefeller Foundation to generate ways to strengthen Social Security for vulnerable populations. Infranca, who was a Hays Fellow and Lederman/Milbank Fellow at the Law School, currently is clerking for Judge Berle Schiller ’68 of the Eastern District of Pennsylvania, and will clerk for Judge Julio Fuentes of the U.S. Court of Appeals for the Third Circuit in 2009.



A Path to the Supreme Court

Leila Thompson ’05 has racked up one impressive achievement after another: She was a winner of the Daniel G. Collins 1L Negotiation Competition, served on the *Law Review*, and has held two federal clerkships. Now she’s recently completed a coveted clerkship with Supreme Court Justice Clarence Thomas, making her the first AnBryce Scholar to clerk for the High Court.

A hard worker, to be sure, Thompson nonetheless credits her success in large part to the 10-year-old scholarship program, which pays full tuition

to exceptional students who are from economically disadvantaged circumstances and are the first in their family to pursue a graduate degree.

“I had a hard time growing up. I had to overcome a lot to get here,” says Thompson, who was very much on her own growing up near Seattle. After a high school counselor “showed me that education was the way out,” she says, she attended Stanford University, earning a B.A. in sociology. Graduating in 1997, she held positions in marketing and finance before turning to law.

An Award-Winning Season

Law School professors earn distinctions

RICHARD PILDES, Sudler Family Professor of Constitutional Law, won a 2008 Guggenheim Fellowship from the John Simon Guggenheim Memorial Foundation. The fellowship will support his work on political power, democratic politics and constitutional theory.

Pildes was also elected to the American Academy of Arts and Sciences, which "honors... remarkable men and women who have made pre-eminent contributions to their fields," said Academy President Emilio Bizzi. Other inductees included Supreme Court Justice John Paul Stevens and former White House Chief of Staff James A. Baker III.

DEAN RICHARD REVESZ, Lawrence King Professor of Law, has joined the Council on Foreign Relations, a nonpartisan think tank that analyzes policy choices facing the U.S. and other countries. Associate Professor Cristina Rodríguez also joined the council as a five-year term member.

The National Science Foundation awarded a two-year, \$387,000 grant to **STEPHEN SCHULHOFER**, Robert B. McKay Professor of Law; University Professor **TOM TYLER**, and **AZIZ HUQ**, adjunct professor of law and deputy director of the Brennan Center's Justice Program. The grant will fund a study of how investigative tactics of Western counterterrorism agencies affect levels of trust and cooperation within Muslim communities in New York City and London.

To thwart future attacks, the FBI and the New York City Police Department have used random subway searches, immigrant detention, electronic surveillance and undercover informants; London's Metropolitan Police Service emphasizes dialogue with Muslims. Over a year-long period, Brooklyn and East London Muslims will be interviewed, and their responses analyzed, to reveal attitudes toward their respective law enforcement authorities. A final report is expected in 2010.



Labor Pains

Steven Greenhouse '82, the *New York Times* labor and workplace correspondent, first became interested in labor issues as a cub reporter and even pressed for unionization at *The Record* in Bergen County, New Jersey. At NYU Law, he took labor law courses with Professor Samuel Estreicher, among others, and was valedictorian of his class. In his 2008 book, *The Big Squeeze: Tough Times for the American Worker* (Alfred A. Knopf), Greenhouse investigates the plight of workers, which, he says, has worsened as companies have demanded more output while offering stagnating wages, shrinking benefits and decreased job security. He uncovered an appalling range of abuses, from firing employees for taking sick days to even locking them in their workplaces. "I was shocked at the extent of the legal violations," says Greenhouse, whose book has made a media splash, featured on CNBC, CNN and other outlets.

Schock and Awe



University Professor Thomas Nagel has received the 2008 Rolf Schock Prize for logic and philosophy from the Royal Swedish Academy of Sciences. The triennial award includes 500,000 Swedish kronor (at press time, roughly \$82,000).

Nagel goes further than most thinkers, says Lars Bergström, a professor at Stockholm University and chair of the selection committee: "When objective and subjective perspectives conflict, it is a common move in philosophy... to subordinate or reduce one to the other. But Nagel... argues that both... perspectives must be taken seriously."

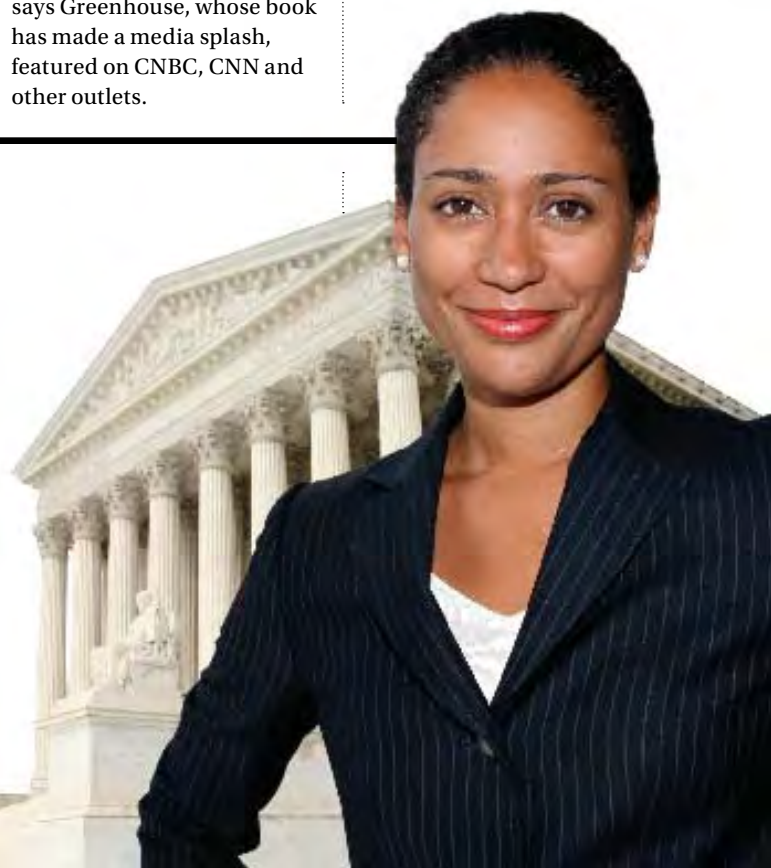
Of Nagel's latest honor, Ronald Dworkin, the Frank Henry Sommer Professor of Law, adds, "The Schock Prize is the hall of fame of contemporary philosophy. The past winners are the great philosophers of the age, and Tom's election to join the list does great honor to him—and to them."

When she got to NYU, Thompson couldn't afford a computer and intended to go without, until Anthony '77 and Beatrice Welters, founders of the AnBryce Foundation, stepped in and bought her one. Dean Richard Revesz and several professors, including Rachel Barkow and Clayton Gillette, also gave her support. "I never saw myself as a star, but they always encouraged me. It's hard not to believe in yourself if so many people that you respect are telling you that you can do it," she says. "I am forever grateful."

Thompson was the first student that Gillette, the Max

E. Greenberg Professor of Contract Law, ever asked to coauthor an article (not yet published). "Leila was one of the most interesting, engaging students I have ever had the privilege to teach," he told the school newspaper, *The Commentator*.

Planning to pursue corporate law after a few months of traveling, Thompson reflected on her Supreme Court stint. "You walk out and look at the building you just came from," she says, and no matter what happens, "you feel good about yourself because it's so amazing."





High Honors for Noble

Professor of Law on Leave Ronald Noble has been admitted as a knight to the Légion d'Honneur in recognition of his service as the secretary general of the International Criminal Police Organization (INTERPOL). France's highest decoration was presented by President Nicolas Sarkozy in a ceremony at the Élysée Palace in June. "I am honored to accept on behalf of the 500 officials at the INTERPOL General Secretariat, and the law enforcement professionals in each of our 186 member countries and National Central Bureaus," said Noble. Sarkozy observed that INTERPOL makes a decisive contribution "in combating organized crime, money laundering, terrorism and in the fight against the sexual exploitation of children." Earlier, Noble credited NYU: "The bulk of my 25 years of public service was possible thanks to the strong support that I have always received from the Law School, its dean, faculty, students and alumni."

Faculty Soundbites

"If...women cast their ballots in ignorance or a fit of rage, the glass wouldn't just be half empty for feminists. It would be shattered—and that's not the glass feminists have been trying to break through all these years."

Professor Rachel Barkow, on why Hillary Clinton supporters would be unwise to vote for Senator McCain, in a June 27 op-ed in *The Huffington Post*

"There is a general perception today that businesses have slipped the traces of public control and that unregulated market forces will not ensure a just, or even efficient, economy. It is time to push the reset button, time to reassert the legitimacy of public intervention."

Harry First, Charles L. Denison Professor of Law and director of the Trade Regulation Program, in a June 2 op-ed in *The Nation*

"The language of the decision and the spirit of the decision suggests that when the challenge to New York's law comes, it will be struck down as unconstitutional."

James Jacobs, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, on the Supreme Court's overturning Washington, D.C.'s handgun ban, in a June 27 *New York Sun* interview

"Its political significance should not be underestimated since it will require careful and continuing coordination, for the first time, between state-owned mainland and Taiwanese industrial titans."

Professor Jerome Cohen, on potential cooperation between Taiwan and mainland China in oil and gas exploration, in a July 10 op-ed cowritten with Chen Yu-jie in the *South China Morning Post*

"We're not demanding that all these kids be released tomorrow. I'm not even prepared to say that all of them will get to the point where they should be released. We're asking for some review."

Professor Bryan Stevenson, who also is executive director of the Equal Justice Initiative, on the U.S. practice of giving life sentences without the possibility of parole to juveniles as young as 13 or 14 years old, in an October 27 *New York Times* interview

U.S. Blocks Haitian Aid, Report Finds

The Center for Human Rights and Global Justice (CHRGJ), along with three other human rights groups, accused the U.S. government of "breaching its duty to respect human rights" and deliberately blocking loans for projects that would have resulted in safe, clean water for residents of Haiti.

In June, CHRGJ, working in conjunction with Zanmi Lasante, Partners In Health and the Robert F. Kennedy Memorial Center for Human Rights, released a report contending that in 2001 U.S. Department of Treasury officials, among others, used their clout to block \$54 million in previously

approved loans from the Inter-American Development Bank to the government of Haiti.

The reason, according to the report: The U.S. government wanted to use the money as "leverage" for political change in Haiti. The funds were earmarked to make urgently needed

improvements to the municipal water systems in several Haitian cities.

Residents of the poverty-stricken Caribbean island nation suffer from lack of access to potable water, with





Dworkin Wins the Holberg Prize

NEW YORK UNIVERSITY LAW PROFESSOR RONALD M. DWORKIN, who is widely considered among the most influential theorists on ethics and morality in law, won the 2007 Ludvig Holberg International Memorial Prize, carrying a cash prize of 4.5 million kroner (at press time, roughly equivalent to \$870,000).

Dworkin, Frank Henry Sommer Professor of Law, is the first to receive the prize for legal scholarship. He was cited for having “developed an original and highly influential legal theory grounding law in morality,” and having a “unique ability” to tie abstract philosophical ideas together with “concrete everyday issues in law, moral philosophy and politics.”

A faculty member since 1975, Dworkin is the fourth winner of the annual award—named for the Dano-Norwegian playwright and author of the *Age of Enlightenment*—which is modeled on the Nobel Prize. The committee highlighted six of his books, including *Law's Empire*, *Life's Dominion* and *Is Democracy Possible Here?*

“Many people, I fear, many lawyers, think of the law as a rather mechanical discipline,” Dworkin observed, accepting the medal from His Royal Highness Crown Prince Haakon of Norway at a November 28, 2007 ceremony in Bergen, Norway. The Holberg, he said, celebrates the view that the “intellectual breadth and

moral depth of the law depends upon seeing it as drawing from and contributing to all the other domains, among them philosophy and the humanities.”

Dworkin argues that the legal system should be seen as having two parts: rules set by law and principles of a moral nature. But when the law is fuzzy, he asserts, judges must interpret the law using evolving principles of justice and fairness.



Terror Tradeoff

The Brennan Center for Justice chose Stephen Holmes, the Walter E. Meyer Professor of Law, to give the keynote address at the 11th annual Thomas M. Jorde Symposium, which sponsors scholarship on issues central to the legacy of Justice William Brennan. Holmes delivered two lectures: “Playing by the Rules in the Age of Terror,” at UC Berkeley School of Law in November, and “Misunderstanding Trade-Offs in the War on Terror,” at Yale Law School in April.

In the lectures, Holmes, who teaches a course on legal issues arising from 9/11 and the war against terrorism, explored the consequences of sacrificing civil liberties for security concerns. “We were not so wise. We lost our compass while taking off our gloves,” Holmes said. “Only those who fail to appreciate the gravity of a looming threat would advocate a wholesale dispensing with rules developed to improve the intelligence of decisions made during emergencies.”

almost 70 percent of the population dependent on private sellers of water as a result, CHRGI noted. While in the U.S., a flush of a toilet uses 1.6 gallons, “the people we studied are using 2.43 gallons of water per day for eating, drinking, sanitation, the whole deal,” said Associate Professor of Law and CHRGI faculty director Margaret Satterthwaite '99.

“That’s a clear violation of the basic human right to water.” Amanda Klasing '08 acted as primary investigator in Haiti, helping to conduct a study documenting the impact of contaminated water on Haitians’ human rights.

The 87-page report, covered by *The New York Times* and others, is also based on internal government documents

obtained by the RFK Center through a Freedom of Information Act lawsuit. The funds were eventually released in 2003, but the projects they were meant to finance were derailed and remain stalled. The U.S. Treasury Department has declined to comment on the report but has said the U.S. remains supportive of financial efforts to aid Haiti.

A Statistical Snapshot

Crunching the numbers on the backgrounds of the 27 faculty members hired since 2002 yields some interesting data.

Number of professors who clerked for the U.S. Supreme Court:

6

(Deborah Malamud, Rachel Barkow, Troy McKenzie '00, Cristina Rodriguez, Samuel Rascoff, Catherine Sharkey. Kevin Davis clerked for the Canadian Supreme Court)

Ratio of professors who clerked for liberal U.S. Supreme Court justices to those who clerked for conservative justices:

2:1

Approximate percentage of professors who hold a Ph.D.:

30%

(Jennifer Arlen '86, Oren Bar-Gill, Stephen Choi, John Ferejohn, Moshe Halbertal, Daniel Hulsebosch, Samuel Scheffler, Jeremy Waldron)

Ballpark estimate of the number of law school campuses using casebooks coauthored by Samuel Issacharoff, Stephen Choi and Arthur Miller:

133

(To learn more about the new faculty, turn to page 46.)



Supreme Citing

Student's article noted by High Court

The *NYU Journal of Law & Liberty* is barely three years old, but already it—and one of its cofounders—has shot into the spotlight. A 2008 article by Brian L. Frye '05, "The Peculiar Story of *United States v. Miller*," was cited in U.S. Supreme Court Justice Antonin Scalia's June majority opinion in *District of Columbia v. Heller*, which ruled Washington, D.C.'s ban on handguns unconstitutional. "This is recognition of the highest order," noted Barry Friedman, vice dean and Jacob D. Fuchsberg Professor of Law.

Frye first became interested in the 1939 *Miller* case, the Court's last Second Amendment case, while doing research for Inez Milholland Professor of Civil Liberties Professor Burt Neuborne. "I realized that people had not done a lot of primary source research" on it, says Frye, who is now a Sullivan & Cromwell associate.

After graduating, Frye slotted his *Miller* case research into time left over from his federal and state court clerkships. "I was fortunate that NYU has a really fantastic legal history sub-department, with professors like Bill Nelson and John Reid and Daniel Hulsebosch, all of whom were incredibly helpful," says Frye.

In Justice Scalia's opinion, he cited Frye's article, saying that Justice John Paul Stevens's dissent was incorrect in relying upon *Miller* because *Miller* "did not even purport to be a thorough examination of the Second Amendment." Now Frye is working on his next article; combining his passion for law with his long-time fascination with film, it will describe how an avant-garde film affected Abe Fortas's nomination for Chief Justice. "I just hope I can continue to produce scholarship that people find useful," he says.

"Roots" Flourish

WHEN 16 LAW SCHOOL STUDENTS GRADUATED THIS PAST May, not only did these new lawyers mark a milestone, but so did the Root-Tilden-Kern Scholarship Program. For the first time in more than two decades, the RTK Scholarship program provided all these graduates with a full three-year ride.

"This is a big deal," Deborah Ellis '82, assistant dean for public interest law, told the *New York Law Journal* in May. "The cost of tuition keeps going up and up, but the salaries of public interest lawyers don't go up that much."

Founded in 1951, the program is named for alumni Elihu Root (Class of 1867), the statesman, New York Governor Samuel Tilden (Class of 1841), and Jerome H. Kern '60, chairman of the Colorado-based Symphony Media Systems. It provides need-blind, tuition scholarships to gifted students committed to public service careers and has been a model for other public service scholarships, including the newly established Gates Public Service Law Scholarship at the University of Washington. But as earnings on the endowment principal did not meet rising costs, both the number and the amount of the scholarships had been cut.

However, thanks to a 50th anniversary fundraising drive kick-started by a \$7.5 million gift from Kern, himself a "Root," every new incoming class of "Roots" now will enjoy a full three-year ride. The RTK program awards 20 full scholarships each year. The new graduates have positions ranging from death penalty work in Alabama to counseling at-risk youth in New York City.



Immigrant Rights Clinic Wins Lee Case

After nearly eight years of proceedings before numerous courts, the deportation case *Lee v. Ashcroft* finally ended, thanks to work by the Immi-

grant Rights Clinic. "It's really a wonderful thing to know that for Yuen Shing Lee and his family, this nightmare is over," says Alina Das '05, a clinical teaching fellow and supervising attorney for the clinic.

Lee, a U.S. lawful permanent resident since leaving Hong Kong as a child, faced deportation due to a 1999 conviction for mail fraud. Students Chirag Badlani '08 and Alexa Silver '08, super-

vised by Professor Nancy Morawetz '81, won a motion to terminate removal proceedings against Lee, who had faced forcible return since 2000.

Law students working for the clinic first argued that Lee should be treated as a U.S. national because he had applied for citizenship and his immediate family were all U.S. citizens. When the U.S. Court of



Appeals for the Second Circuit struck that argument down, the clinic litigated whether a mail-fraud conviction should qualify as an aggravated felony. In June, an Immigration Court judge ruled it should not, and the federal government decided not to appeal.

This is the Immigrant Rights Clinic's second victory in the last year involving the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty



A Big Win

Christopher Meade '96 was celebrating on June 16. The WilmerHale partner learned that he had won a hard-fought pro-bono immigration case before the Supreme Court: *Dada v. Mukasey*. At issue in the case was how to reconcile seemingly contradictory provisions of immigration law when a deportable immigrant seeks to pursue a motion to open his case, based on changed circumstances, after he's agreed to leave the country voluntarily. Meade argued that the laws weren't in conflict, if read together. The Court agreed. The 5-4 ruling could affect about 20,000 immigrants yearly. Jodie Morse '06 assisted Meade, and Professors Nancy Morawetz, Rachel Barkow and Cristina Rodríguez prepped Meade by holding a moot court. In December, Meade will argue a veterans' rights case in the Supreme Court, marking his third Supreme Court argument in three consecutive terms.



Act. The 1996 laws, which expanded the list of offenses that could be considered aggravated felonies, left longtime U.S. residents who were guilty of such crimes subject to deportation without the right to most forms of relief.

In *Gutiérrez v. Gonzalez*, the clinic represented Luis Gutiérrez-Castro, a legal permanent resident who was deported to Columbia in 2000 as a result of a 1995 car theft conviction. Angelica Jongco '05 fought for and won Gutiérrez's



Waldron Gives Storrs Lectures

What part, if any, should international law play in the highest courts of the United States? University Professor Jeremy Waldron explored this question when he delivered the 2007 Storrs Lectures over the course of three evenings at Yale Law School.

Waldron observed that courts in other countries, such as his native New Zealand, have embraced citing American decisions in their rulings. Why, he suggested, shouldn't judges here do the same?

"To use a perhaps inadvisable metaphor, we are at a sort of Tinkerbell moment," Waldron said in his lecture. "This material will exist as a body of law if judges believe in it enough and begin articulating their beliefs into their practices of adjudication." Waldron tackled a similar theme when he delivered a lecture at NYU (see page 37).

right to return to the U.S. in 2007, but he was able to come back to the country only earlier this year.

The clinic, founded by Morawetz in 1998, represents both individual immigrants and advocacy organizations in the field of immigrant rights.

"Not only do our students represent individual clients facing [immigration] challenges, they are also thinking about how their work fits into the broader immigrant rights movement," explains Das.

Two Testify for Tax Reform

Who: Lily Batchelder, Associate Professor of Law and Public Policy

Where: Senate Committee on Finance

When: March 12, 2008

Who: Daniel Shaviro, Wayne Perry Professor of Taxation

Where: Senate Committee on Finance

When: April 15, 2008

The impending one-year repeal of the estate tax in 2010 creates an opportunity for Congress, says Law School Professor Lily Batchelder. Asserting that it is the *only* tax on inherited income, and perhaps the most important barrier to intergenerational economic mobility, she proposed improving, not repealing, the current wealth-transfer tax system. "The estate tax is not a double 'death' tax on the decedent," she said. "Instead it is a tax on a major source of unearned income for those who are fortunate enough to be born into [wealthy] families." Batchelder proposed: Replace the estate-tax system with a revenue-neutral inheritance tax so heirs pay income tax as well as a 15 percent flat rate on the portion of a windfall that exceeds \$2 million; or reduce incentives for donors to rely on sophisticated and expensive tax advice.

"The old Chinese curse, 'May you live in interesting times,' has perhaps never been more applicable to U.S. tax policy than it is today," said Daniel Shaviro. President Bush's 2001 and 2003 tax cuts are set to expire in 2011, and an estimated 30 million taxpayers may face the alternative minimum tax by 2010. Shaviro argued for broadening the base and lowering tax rates, but doing so in a coherent manner. Rules for taxing businesses need attention, as many businesses report a higher income to shareholders to boost investments and a lower one to the I.R.S. to lower taxes. Also, Shaviro urged that filing be made easier for low- and middle-income households: "All this complexity is not just a matter of slaying trees to supply the endless cascades of paper needed for all the forms. It undermines compliance and...public trust."







The happy family, 1937.

From Darkness

Thomas Buergenthal '60 has a picture of himself and his parents taken in the spring of 1937. He is three, a blond, curly-haired boy who looks into the camera with the serene assurance of a well-loved child. His mother, Gerda, short and dark-haired, wears a suit; his father, Mundek, a tall man in a jacket and bow tie, wraps his arm protectively around his wife. The three of them look happy. In fact, they were a family on the edge of an abyss.

Shortly afterward, the family's hotel in Lubochna, Czechoslovakia, was seized by the local Fascist militia and the Buergenthals escaped to Poland, where they applied for English visas. On the day Hitler invaded, they were on a train bound for the border with the visas in hand—only to have their train bombed. They wound up in the Jewish ghetto of Kielce for several years, surviving two massacres. Eventually, they were sent to Auschwitz, where Buergenthal was separated from his parents. About a year later, when the camp was evacuated in January 1945, he was among a group of prisoners who made the 44-mile trek across the frozen Polish countryside that later came to be known as the Auschwitz Death March. Buergenthal was 10 years old, one of only three children who survived. Mundek Buergenthal was executed by the Nazis at Flossenbug in the last days of the war. Gerda Buergenthal survived and spent the next 18 months searching for her son before finding him in a Polish orphanage run by a Jewish relief group.

Today, the boy who survived all that is a 74-year-old, white-haired judge on the International Court of Justice (ICJ) at The Hague—the principal judicial organ of the United Nations and an increasingly busy forum for international disputes that range from boundary feuds to the death penalty. In the decades between then and now, Buergenthal has emerged as one of the main architects of the legal institutions and procedures needed to apply the abstract concept of “human rights” to real-world problems. In 1979, he was elected to a judgeship on the Costa Rica-based Inter-American Court of Human Rights (IACHR), the most important human rights tribunal in Latin America; in 1990, he served on the U.S. delegation to the first post-Cold War conference in Europe, helping to draft standards for democratic elections in newly formed Eastern European nations; in 1992, he was appointed to the U.N. Truth Commission for El Salvador. In 1995, he became the first American to be elected to the U.N. Human Rights Committee.

By Tracy Thompson

Clearly, it's been a remarkable life. Yet outside academia, the U.N. and the State Department, Thomas Buergenthal is not a household name, which seems a little strange. How could anyone have accomplished so much from such bleak beginnings and not have the kind of fame enjoyed by, say, fellow Holocaust survivor and Nobel Peace Prize-winner Elie Weisel?

The comparison is inevitable: After decades of false starts, Buergenthal has finally managed to put his life story on paper. *Ein Glückskind* (*Lucky Child*) describes some of the same events as Weisel's classic 1958 Holocaust memoir, *Night*—and despite

of Human Rights, a body I'd never heard of. I went to his office at Emory and met a short man whose meticulously groomed curly hair reminded me of my father's, and whose perfect manners were more formal than the casual Southern friendliness I was used to. We did a brief interview about the Carter Center's new program, which frankly didn't interest me much, and after a while I stood to leave. As I did, he asked—almost shyly—"Would you like to know a little bit about my childhood?" I sat back down.

I heard only the most truncated version of his story that day, but even so, it was difficult to grasp that the child who had experienced such horrors and the man sitting

across from me were one and the same. As it happened, Buergenthal had on his bookshelf the English translation of the memoirs of Odd Nansen, the Norwegian author and humanitarian, who had met Buergenthal when they were both prisoners at Sachsenhausen after the evacuation of Auschwitz. Buergenthal showed me the book's dedication, which was to the millions of victims of the Holocaust—"and especially you, little Tommy."

"That's me," he said, smiling. "Now you know why I'm doing human rights law instead of international business law."

I wasn't familiar with either field, but I knew a remarkable witness to history when I met one. Not long after, I invited Buergenthal and his wife, Peggy, over for dinner and cooked my best "company" meal, roast leg of lamb, which they seemed to relish. Years later, Buergenthal confessed that the smell wafting from the kitchen when he

and Peggy walked through my door had nearly made him retch: For years after the war, the only meat available had been mutton. Unwittingly, I'd served him something he'd sworn off forever.

That kind of diplomatic fortitude is an occupational requirement for a judge at the ICJ, where the most mundane cases—a complaint from Argentina, say, about pollution from a Uruguayan pulp mill—arrives bristling with international political tensions. The 15 judges on the court, who hail from a variety of backgrounds, must interpret and apply legal precedents that are still relatively new compared to most common law concepts, and do it while maintaining at least the appearance of collegiality. Buergenthal finds this relatively easy: He is unassuming, multilingual (he speaks German, English, Polish, Spanish and a little Italian), knowledgeable about other cultures and always eager to learn more. On days when the ICJ is in session or he is working in his office at the court's headquarters in The Peace Palace in The Hague, he usually lunches with his fellow judges in their private dining room.

He also brings heavyweight scholarly credentials to the task. He wrote the book on post-war human rights law—literally: His 1973 text *International Protection of Human Rights*, coauthored with Louis B. Sohn, was the first American casebook on the subject, and paved the way for introducing human rights into law school curricula across the country. Subsequent books, written with George Washington University Law School professors Dinah Shelton and David Stewart, are required reading for students in the field.

Within his field, Buergenthal is famous. But the community of international human rights legal scholars is relatively small, and the field as a whole suffers from an image problem. Most Americans associate the phrase "human rights" with the word "violation."



LOVING ARMS: Thirteen-month-old Buergenthal with his father, Mundek, in 1935.

the hundreds of Holocaust books that have been written in the last 60 years, *Ein Glückskind* quickly hit the best-seller list in Germany, where it was first published in 2007. So far it's sold more than 100,000 copies in Germany and is currently in print in nine countries, with British and American publication set for early 2009. Germany, the country that once stripped Buergenthal of his citizenship, is now eager to lionize him: Suddenly, there are television interviews, audio books to record, invitations to be honorary this or that, even the dedication of a library named for him in his mother's hometown of Göttingen.

Writer Krista Tippett has observed, "Goodness prevails not in the absence of reasons to despair, but in spite of them. People who bring light into the world wrench it out of darkness, and contend openly with darkness all of their days."

"After all you have seen," I asked him, "do you really think a species seemingly intent on self-destruction is also capable of creating a coherent, enforceable jurisprudence of human rights?"

The man who has witnessed so much of that darkness has an unhesitating reply: "I don't have any doubt."

Full Disclosure

Thomas Buergenthal is an old friend of mine. We met in 1985 when I was the legal affairs reporter for the *Atlanta Constitution*, fresh from the Master of Studies in Law program at Yale Law School. He had just been named director of the newly established Human Rights Program at the Carter Center in Atlanta, a position that came with a teaching post at Emory University School of Law. He had also just been elected chief justice of the Inter-American Court

Bombarded as we are with stories about Abu Ghraib, the murderous fanaticism of the Taliban or tribal warfare in Kenya, it's easy to conclude that the state of human rights today is a sorry mess.

That would be the short view. The long view is that progress in human rights law since World War II has been "phenomenal," said Murry and Ida Becker Professor of Law Emeritus Thomas Franck, and he repeated the word for emphasis: "*phenomenal*."

One of the lesser-known facts about the Nuremberg War Crimes Trials at the end of World War II is that they specifically *excluded* acts in which the victims were German citizens, Franck noted. Why? Because at the time, what a government did to its citizens was considered purely a domestic concern. Genocide was viewed in the same way wife-beating used to be: a distasteful matter outsiders were well advised to ignore.

But just as domestic violence is now considered an urgent social problem, "there has been a sea change in the fundamental issue, which is that how a government treats its citizens is no longer considered purely a domestic matter," Franck said. A formidable body of human rights law has sprouted in a mere half century from a seed planted in the ruins of World War II. Among other things, the charter of the United Nations pledges "international cooperation in...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." That was followed by the passage of the Convention against Genocide, better known as the Geneva Convention, and the 1948 Universal Declaration of Human Rights.

But what, exactly, *are* "human rights"? Over the ensuing decades, the exacting work of defining the term and the methods by which its protection would be enforced was left to a variety of U.N.-created commissions and to the bodies that interpreted international conventions, such as those barring torture or race discrimination. Another body of law evolved within the framework of agencies like the U.N. Educational, Scientific and Cultural Organization (UNESCO) or the International Labor Organization, both of which incorporate human rights protections into their charter.

World events also played a role: The bloody civil wars that erupted in the 1990s in Yugoslavia and Rwanda spawned tribunals to try individuals charged with crimes against humanity, genocide and war crimes (the International Criminal Tribunal for the former Yugoslavia, for instance). The credibility those tribunals established led, in turn, to the creation of the International Criminal Court in 2002. Over the same period, three regional human rights judicial systems were evolving: the European Court of Human

Rights (established in 1953), IACHR (1979), and the African Court on Human and Peoples' Rights (2006).

Buergenthal's major contribution has been in Latin America. The United States is not a party to the convention that created the IACHR, but Costa Rica is. That nation nominated Buergenthal, who had already established

himself as an expert in regional human rights tribunals, and his U.S. nationality helped boost the fledgling institution's credibility.

Credibility is no longer an issue. The IACHR has established an extensive body of case law dealing with the enforcement of human rights in Latin America, on issues ranging from state censorship to violent political repression. It was the first international tribunal to hold a state financially liable for waging a campaign of "forced disappearances" against its political opponents. In that 1988 ruling, the court ordered the government of Honduras to pay restitution to the families of the victims during that country's civil war earlier in the decade. The ruling was itself remarkable; even more remarkably, the government of Honduras complied.

Since then, IACHR case law has taken root in the constitutions of more than 20 countries in Latin America. The result has been a dramatic increase in recent years in the number of human rights cases initiated by governments themselves against the actions of previous regimes. Case in point: the 1998 detention of General Augusto Pinochet, the former Chilean dictator, in London, and his subsequent prosecution on charges of systematic human rights abuses during his 16-year rule. Since then, similar cases have been brought in Mexico, Uruguay, Brazil and Peru, marking a radical shift toward accountability in a part of the world with a long history of repressive military dictatorships.

"When I came to Latin America, you couldn't really even talk about human rights," Buergenthal said, and it's clear from the frequency with which the subject of Latin America comes up in conversation that he regards his tenure on the IACHR as one of the most satisfying periods of his career. Though it would be hard to single out Buergenthal's single most important contribution to human rights law, his IACHR work would be at or near the top, colleagues say. "He's had a role in improving the well-being of an awful lot of people," said GWU Law Professor Sean Murphy. Human rights law may be an esoteric topic to most people in the United States, "but in Latin America, it's in the papers every day."



THE GRADUATE: The summer before he entered law school, Buergenthal visited his mother, Gerda, in Italy, where she had settled after the war.



LOST BUT FREE: Taken in by Polish soldiers, 10-year-old Buergenthal had his own pony, gun and uniform. This soldier eventually took Buergenthal to an orphanage where his mother would find him a year later.

The Immigrant Becomes a Citizen

Buergenthal arrived in this country in 1951 aboard a ship crowded with European refugees, carrying one suitcase and a smelly \$50 bill in his shoe—a 17-year-old high school student whose years of missed elementary school education had been only partially remedied by private tutoring. He lived with an aunt and uncle in Paterson, N.J., and, despite his initial handicaps, graduated in the top quarter of his class. After high school, he accepted a scholarship to Bethany College, a small liberal arts college in West Virginia.

In his senior year at Bethany, the school recommended him for a Rhodes Scholarship to study law at Oxford University. After making



THE LAW STUDENT, 1960: Buergenthal's closest friends from the Law School remain those who lived in his dormitory, Hayden Hall.

it through the first selection round, he arrived at the final interview unprepared and babbled aimlessly. That ended his Rhodes prospects, but one of the interviewers was impressed enough to slip him a note advising him to apply to NYU's Root-Tilden Scholarship Program. Buergenthal did, and not only won a scholarship, but also a stipend covering room, board and books. The stipend, Buergenthal said, made all the difference: Even with an academic scholarship, he simply did not have any money to live on. "Without it, I wouldn't have been able to go to law school," he said.

Buergenthal recalls his first year of law school as a tough academic transition, though it was eased by life in Greenwich Village, in those days a small town that just happened to be in the middle of a busy metropolis. He roomed at Hayden Hall with Alan Norris, now a senior judge of the U.S. Court of Appeals for the Sixth Circuit in Columbus, Ohio. Norris, who is still a close friend, recalled that he and Buergenthal had little in common in terms of politics, but his roommate cheerfully tolerated the oversized picture of Republican Senator Robert Taft that Norris hung in their room.

Buergenthal's fellow law students remember him as friendly, but no party animal. "He never went out with the boys drinking, but he always had time for an event," says John Blyth, a New York real estate lawyer who met Buergenthal when one of their professors seated the incoming students in alphabetical order. And though Buergenthal never made much of it, "after a while everybody knew about his background in the camps," Blyth said. "Nobody ever said much about it."

In his third year at NYU, Buergenthal married Dorothy Coleman, who had been a fellow student at Bethany College. Over the next 19 years, the couple raised three sons while Buergenthal pursued an academic career that took him to the University of Texas as well as American, Emory and George Washington universities. His marriage to Coleman ended in 1981. Two years later, he married Peggy Bell, a Peruvian-born conference interpreter.

Aside from his rocky introduction to law school, Buergenthal said, he has warm memories of his time at NYU—in particular, of Robert McKay, the constitutional law scholar who would later become dean. "My best friends to this day are fellow Root-Tilden students

who also lived in Hayden Hall," he said. His association with the school continues: The international law program that has developed since Buergenthal's days now sends students each year to work as interns at the ICJ.

If he were a baseball umpire, Buergenthal would be described as having a consistently narrow strike zone. He goes where he thinks the law goes, even when U.S. foreign policy and/or its military and political strategies go another way—that far, and not an inch further. His circumspection is partly a product of his history, says Sean Murphy: "He is sensitive to the perception that because of his Holocaust experiences there might be some who would question whether he could be impartial."

Buergenthal's judicial perspective is often invoked in procedural terms. In 2003, for instance, a majority of the court ruled that the United States illegally invoked a national security rationale for destroying three offshore oil platforms owned by Iran in 1987 and 1988. Buergenthal differed—not because he sided with the U.S. on the merits, but because in his view the court lacked jurisdiction to address the issue. The same year (2003 was notable for the number of controversial ICJ cases) the U.N. General Assembly asked the ICJ for an advisory opinion on whether Israel was justified in erecting a wall along the Green Line in occupied Palestinian territory on the West Bank. In a 14-1 ruling, the ICJ held that Israel was not, with Buergenthal as the holdout.

But his opinion was not exactly pro-Israel. Instead, he argued that the ICJ should have stayed out of the dispute altogether because the evidence submitted to it by the General Assembly glossed over the history of rocket and mortar attacks on Israel launched from the Palestinian territories. Then he made an even finer distinction: Even assuming that the court had ample evidence before it that Israeli citizens were victims of Palestinian rocket attacks, "a state which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits." A careful weighing of Israel's security needs versus the rights of the Palestinian people along each section of the wall would be needed, and might well show that some sections violated international law while others did not.

"He has convinced the invisible college of international law that he really does care about the law," said Franck, who has been a friend and colleague for 40 years. "He's understated, he's relatively quiet and unassuming, he's made it absolutely clear that he calls the shots as he sees them. He never tries to bully or dominate or wave a big stick.... When the law coincides with [what] the United States [wants], he will call it that way, but if the law doesn't support what the United States wants, he'll go with the law, and everybody knows it. It gives him a kind of clout."

In the Israeli wall case, Buergenthal implicitly criticized his colleagues for ignoring certain facts to fit their ruling when he wrote that the humanitarian needs of the Palestinian people would have been better served if the ICJ majority had taken a complete factual record into account, "for that would have given the Opinion the credibility I believe it lacks."

Yet neither judicial reticence nor artful phrasing can conceal Buergenthal's



As director of the human rights program at the Carter Center, Buergenthal mingled with President Jimmy Carter and Ambassador Andrew Young.

profound differences with the Bush administration's approach to international law and human rights. In 2003, he joined a unanimous ICJ ruling that said the U.S. violated an international treaty by not telling 51 Mexican citizens held on death row in U.S. state prisons that they had the right to seek legal help from their government. The Bush administration demonstrated its displeasure by withdrawing from the convention under which it had agreed to accept ICJ jurisdiction. Even so, President Bush ordered state courts to comply with the ICJ ruling. On March 25, though, the Supreme Court ruled 6-3 that Bush's order had exceeded the authority of the executive branch. Unless Congress explicitly said as much, the majority ruled, international treaties cannot supersede state law. The case seemed over—but in June, Mexico asked the ICJ to temporarily halt Texas' execution plans. In response, the ICJ asked the U.S. to "take all measures" necessary to delay the executions while it considered the request. But on August 5, Texas proceeded with the first execution.

In an era when political differences often devolve into personal attacks, it's worth noting that people who vehemently disagree with Buergenthal's views—and there are many—confine their attacks

to his opinions. A recent post on a blog devoted to ICJ matters, for instance, was scathingly critical of an ICJ opinion "written by your friend and mine, Tom Buergenthal." Still, conservative animus to Buergenthal's views runs deep. He was nominated to the ICJ by the outgoing Clinton administration to fill out the unexpired term of his predecessor, then renominated in 2006 by the Bush administration. But that appearance of bipartisan support is deceiving. Conservatives in the State Department



A FOUNDING JUDGE: From 1979 to 1991, Buergenthal was a judge on the fledgling Inter-American Court of Human Rights in Costa Rica.

were outraged by Buergenthal's rulings in the oil platforms case and by his less-than-vigorous dissent in the Israeli wall case.

"The ICJ in my view has gone out of its way to find actions in violation of international law," said Edwin Williamson, a former legal adviser to the State Department under the administration of President George H.W. Bush. U.S. judges nominated to the ICJ are vetted by the State Department and approved by the president before their names are forwarded to the U.N. General Assembly, where approval is usually pro forma. Buergenthal's renomination might not have made it that far if not for the support of former Secretary of State Colin Powell, who argued that he was both qualified *and* electable, an important consideration at a time when relations between the United States and the United Nations were at a low point over the war in Iraq.

Even then, the Bush administration may have felt it had no choice but to renominate him. ICJ procedures also say that judges can be nominated by any ICJ member country; Buergenthal won the support of a record number of 32 nations. "He would have been elected anyway," Franck said. "And to have been elected anyway as the American judge on the court, without having the nomination of the United States, would not have been very good politics."

What the State Department didn't know, said one source who asked for anonymity, was that Buergenthal would not have accepted the appointment without the backing of his own country.

As critical as he is of U.S. foreign policy under the Bush administration—it has "totally destroyed our credibility on human rights," he said—Buergenthal takes his U.S. citizenship very seriously. Classmate John Blyth recalls that Buergenthal became a citizen while the two of them were at NYU. On the next election day, Blyth said, "the polls opened at 6:00 a.m., and he was there at a quarter to six. And he was the first to vote."

Remembering the Holocaust

On an unusually springlike evening last February, I went with the Buergenthals to a reception at the Israeli embassy in The Hague. It was given by Ambassador Harry Kney-Tal and his wife, Nili, in honor of Israeli writer Aharon Appelfeld, whose latest book had just been published in Holland. The three of us squeezed into seats near the back of the room as Appelfeld—a balding, diminutive man dressed completely in black—kept the crowd rapt with tales of his own youth during the Holocaust.

As the reception was breaking up, Peggy urged her husband to introduce himself. Peggy grew up in a bilingual household in Peru, and speaks with a charming accent that, to my ears, sounds like Zsa Zsa Gabor's. ("No," Buergenthal corrected me when I told him this. "*Eva* Gabor. She was the one I always had a crush on.") Now "*Eva*" was doing a wifely full-court press. "*You must talk to him,*" she said. "*You must tell him about your book.*"

"No," Buergenthal demurred. "There are so many of these books, Peggy." Just then, Nili Kney-Tal came up and put her hand on Buergenthal's arm. "I so wish you had asked a question!" she exclaimed, and Buergenthal shrugged, smiling. He seemed slightly embarrassed. But after a few moments, he edged his way through the dense crowd around Appelfeld, and these two children of the Holocaust had a brief chat out of our earshot.

"What did you talk about? Are you going to send him a copy of your book?" Peggy asked excitedly as we were putting on our coats in the foyer. "Oh, I don't know," Buergenthal muttered. Peggy gave me a look as if to say: *husbands*.

The incident illustrates something that has bedeviled Buergenthal for much of his life. While he has always felt a strong urge to tell his story—he showed Blyth an early draft when they were law students, and he mentioned his desire to write his memoirs on the



Buergenthal and his fellow human rights court judges have an audience with Pope John Paul II in 1983.



Buergenthal, third from left, poses in 1984 with fellow judges on the Inter-American Court of Human Rights (IACHR). During his tenure, the IACHR was credited with developing a significant body of case law dealing with the enforcement of human rights in Latin America.

day I met him—it's been painfully difficult for him to find his voice. For one thing, he had doubts about his writing ability. His youngest son, Alan, 40, a lawyer who works for a health care company in Columbus, Ohio, regards his father as "a great legal author" whose logical presentation is "always a pleasure to read." But narrative prose is a very different genre.

"As one whose prior writing experience has been limited to law books and legal articles, I found writing this book very difficult, and not merely because of the subject," he wrote me in an email last fall. "As a result I am quite insecure about the quality of the book, that is, whether it conveys what I wanted to convey."

Then there are the comparisons that will inevitably be made between *Ein Glückskind* and *Night*. Though they were at Auschwitz at the same time, Buergenthal and Weisel first met several years ago at an event at the U.S. Holocaust Museum in Washington, D.C. Their accounts of the Death March are strikingly similar.

Otherwise, the books could not be more different. *Night* is a primal howl of anguish written when Weisel was only 30 and his memories still raw. Written in 2006, *Ein Glückskind* is the work of a 72-year-old man looking back over half a century. It is less a memoir of the Holocaust than it is the story of how a child's moral intelligence was refined in the cauldron of that horrifying event.

It also has a broader scope. Like Weisel, Buergenthal describes concentration camps that were "laboratories for the survival of the brutish." Unlike Weisel, he also describes generosity and acts of heroism. Weisel asked how God could have allowed such things to happen; Buergenthal asks how people could have allowed it. "What is it in the human character that gives some individuals the moral strength not to sacrifice their decency," he

remarkable not just for the dramatic events Buergenthal has lived through, but also for the number of questions it cannot answer.

"The insanity of it all is hard to fathom," he writes, and the book is peppered with a similar kind of detached bewilderment:

"Generalizations about the Holocaust, about German guilt or about what Germans knew or did not know, do not help us understand the forces that produced one of the world's greatest tragedies." And: "I have often wondered why or how I managed to survive the camps."

Buergenthal says that he wept at times while he was writing *Ein Glückskind*—but overall, the book keeps the reader at arm's length from the events it portrays, and there is a sense that the psychological armor that helped protect the child is now a hindrance to the adult writer. Perhaps it's unavoidable. In one chilling passage, he recounts how he used to sleep in a barracks so close to the gas chambers at Auschwitz that his sleep was often interrupted by the screams of the people being forced inside. After a while, he found a way to cope—by what psychologists call "lucid dreaming." Hearing the screams, he would say to himself in his dream, "This is only a nightmare, there is nothing to be afraid of."

Yet the person who emerges from the pages of *Ein Glückskind* is not a tortured soul, but an irrepressible, mischief-making boy. During his years in Kielce, Buergenthal and his friends would play tricks on the peasant women who tilled the land in

the vacant lot behind their apartment building: They would hide until the women stopped to urinate in the field, standing in their long skirts with their legs spread apart. At just the right moment, the boys would yell or bang on a pot to startle the women in midstream, so to speak. Then the children would run, laughing, pursued by Polish curses.

As an adult, Buergenthal's brand of humor tends toward the droll understatement. Norris, his old roommate, recalls that every man at NYU in the 1950s was draft bait—except for Buergenthal, who was exempted because he had lost two toes to frostbite during the Death March. Every year, Buergenthal would get a notice from the draft board inquiring about his physical fitness; every year, he would write back: "My toes have not yet grown back." Blyth recalls a party where Buergenthal gave an

impromptu performance of the Polish national anthem. He knows how to have fun: Buergenthal's former colleague Murphy recalls a dinner at his home when Buergenthal wowed Murphy's children with his prowess at ping-pong.

At the same time, he is a deeply serious person. Alan jokingly says that "the only way he truly let us down as kids" was by nixing a family trip to Disney World, which his father thought was a waste of time. Robert, who is 45 and works as a senior counsel in the Justice Reform section of the World Bank in Washington, D.C., remembers that at family dinner "every child reported on his schoolwork and there was always an issue to discuss."

Buergenthal and his sons have a running argument about how much he told them about his childhood. Buergenthal says his children never showed much interest. His sons emphatically



REFLECTIONS: Buergenthal, with wife Peggy on the Rhine in 2005, has published his memoirs of his first dramatic 74 years.



AUSCHWITZ 55 YEARS LATER: Buergenthal recalls it was "just as cold" as it was the day he left on the infamous Death March in January 1945.

writes, while others "become murderously ruthless?" How could such brutality be inflicted by such ordinary people—men who would "go home in the evening to their families, wash their hands before sitting down to dinner as if what they had been doing was a job like any other"?

A reader might hope that age and wisdom have given Buergenthal insights that eluded the youthful Weisel, but not so. Buergenthal seems as stymied by these questions as Weisel—more so, in fact, since the intervening years have shown too clearly that the Holocaust was hardly a singular event. As a teacher or a judge, he can be exacting, a stickler for the precise word, the correct phrase. But he has no answer to the mystery of human evil, and he is uncharacteristically inarticulate when it comes to exploring the emotional landscape of his experiences. *Ein Glückskind* is

differ, but say what they learned came in bits and pieces. “If you asked questions, he’d always answer,” Alan said. At other times, information would emerge in odd ways; once, Robert said, his father told him that he’d been unable to carry Robert around as a baby because of a back injury he suffered during a beating in the camps. Buergenthal spoke far more easily about his grandparents, murdered by the Nazis in 1942, or his mother, who remarried after the war and lived in Italy, with frequent visits to this country, until she died in 1991.

When Robert was in junior high school, he read *Night*. “I told Pop it sounded a lot like his stories, and I asked him to read it,” Robert said. The answer was no. To this day, his father avoids Holocaust literature and movies depicting the period. When *Slaughterhouse Five* became a movie in 1972, Robert remembers, his parents came home from the theater early; his father could not bear to watch it.

“Until this book, no matter what he may say, he never walked us through his history,” said Robert. And yet the proverbial elephant was always in the room: “Everything about him was shaped by the war or the Holocaust.”

A Sustaining Faith in the Law

One day in the fall of 1944, the prisoners at Auschwitz were called to assemble for one of the many “selections” the Nazis performed to get rid of prisoners unfit for work. One by one, the prisoners walked before a panel of doctors—a group which may have included Mengele himself, though Buergenthal will never know for sure; he was too terrified to look up. He followed his father in the line, looking for an escape route. At the head of the line, the doctors ordered Mundek Buergenthal to go left and his 10-year-old son to go right. Mundek grabbed his son, but a guard tore the boy away while another kicked the elder Buergenthal out the barracks door. It was the son’s last glimpse of his father.

Buergenthal was taken to another barracks, where all the other prisoners were old, sick or succumbing to starvation—clearly, destined for the gas chamber. So was he; children were considered unfit for manual labor, and it was a miracle he had survived this far. Three times over the next few hours, Buergenthal managed to escape through the back door of the barracks; three times, for reasons he still finds unfathomable, the other prisoners alerted the guards that he was escaping. Finally—baffled, angry, overcome with grief and fear—he sat down against the wall in a corner.

Until then, I had been gripped with fear, fear of dying. But then something most unusual happened. Slowly, very slowly, my fear and anxiety faded away....An inner warmth streamed through my body. I was at peace, my fear had vanished and I was no longer afraid of dying.

“I can’t explain it,” he said to me.

We were sitting in his office in The Hague, located in a modern building next door to the ornate 19th-century edifice where the court holds its hearings. Through a window left slightly open to the springlike air, I heard a distant hum of traffic; a pair of Nile geese floated on a pond outside.

Was it a spiritual experience? I pressed. “No,” he said. His family was never observant, and his experiences in the war eliminated any vestige of a belief in the Divine. The best way he can describe that moment was that it was the intense realization

that “death is always just a moment away.” Which, in a way, is a spiritual epiphany—but the moment passed, and in the years since he has never totally recaptured it.

Alan Norris has told him that it was more than just cosmic coincidence that on the day Buergenthal was chosen for the gas chamber, the ever-efficient Nazis did not have enough prisoners to justify firing up the crematorium—just as it was more than coincidence that a Polish camp doctor later secretly altered his identity card, saving his life. Buergenthal disagrees. His survival, he says, was simply luck. “I admire people who are religious—well, not the extremes—but I don’t believe in a personal God the way some people do,” he said. “I wish I could. It would give me strength.”

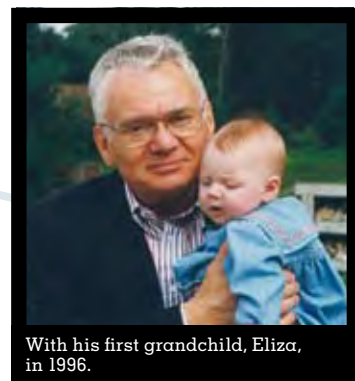
Yet, in a way, the absence of one kind of faith has left room for another: a faith in the power of law. The law is no panacea, he concedes; it has never prevented terrible things. But it can at least be a “no trespassing” sign posted at the edge of the abyss. There are reasons to think this is a useless gesture: Cambodia, Rwanda, Bosnia, Darfur. But, Buergenthal points out, the same decades that brought us those events have also brought the end of apartheid, the fall of the Berlin Wall, the replacement of autocratic regimes with democratically elected governments in Latin America, a proliferation of international tribunals and a growing number of nations willing to comply with their rulings.

On a trip to Columbus last year, Alan told me, his father was looking through some family photos with Alan’s seven-year-old daughter, Ruth, and explaining to her how so many of their relatives had died, why their extended family was so small. The next day, Alan said, Ruth went to her first-grade class “and she told what she could about what happened to my father, and the kids said, ‘Oh, you’re lying, people don’t do things like that for no reason.’”

But people have, and probably will again. Meanwhile, Buergenthal shows up for work every day at a court with a steadily growing caseload. The years are passing, and he would like to spend more time with his grandchildren. But his work is not finished; it may never be. Building a jurisprudence of human rights is like building the Taj Mahal, or the pyramids of ancient Egypt: The goal is ridiculously ambitious, the work takes decades, and the craftsmen labor in anonymity. Even then, the results are imperfect, and susceptible to vandals and the passage of time.

What’s most amazing about those wonders, though, isn’t how well they have survived. The most amazing thing is that anyone ever thought of building them in the first place. □

Freelance journalist Tracy Thompson wrote *The Ghost in the House: Motherhood, Raising Children and Struggling with Depression* (HarperCollins, 2006). Recently she contributed to the anthology *The Maternal Is Political* (Seal Press, 2008).



With his first grandchild, Eliza, in 1996.



Buergenthal receives an honorary Doctor of Laws degree from NYU Provost David McLaughlin (far left), Law School Trustee Evan Chesler ’75 (rear, right), and NYU President John Sexton.



Leveling the Political Field

IN 1986 SAMUEL ISSACHAROFF WAS IN SPRINGFIELD, Illinois, handling an election law case that revolved around restrictions on black politicians. Issacharoff, then 32, had been around these kinds of voting rights cases for a while, finding them not especially exciting—too technical, too many statistics bandied about by would-be experts that tended to dull the brain. But something happened at the Springfield trial that Issacharoff remembers today in great detail.

His lead client, a candidate for Chicago's city council named Frank McNeil, was on the stand testifying about an at-large election system that essentially worked to keep blacks from obtaining office. The opposing lawyer seemed to find an opening that could spell trouble.

"Is it true, Mr. McNeil," the lawyer asked, "that the real reason you're running for office is you want pork to be distributed to your constituency?"

McNeil responded confidently: "If there's pork to go around, I want my people to get some, too."

That pithy, off-the-cuff testimony provided an epiphany of sorts for Issacharoff. It disrupted how he thought about election law and how to organize democratic politics. It was the end result that mattered more in these issues, he thought. The courts should perhaps confine themselves mostly to making

sure the political process and institutions were open and responsive—not parse each issue through the constitutional prism of individual rights. In short, Issacharoff said, McNeil's aphorism was sounding right: Let everyone have an equal seat at the table—and the pork would be distributed just fine.

This spare notion would develop into a distinct field of law, known as the Law of Democracy, that attempts to find a unified theory of election law. It was crafted by Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, his colleague Richard Pildes, Sudler Family Professor of Constitutional Law, and Pamela Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School. Their work culminated in a book, first published in 1998, *The Law of Democracy: Legal Structure of the Political Process*. More than a mere textbook about election law, it was, as one reviewer observed, a statement about democracy in America, including an unusual assemblage of case studies, political theory, political philosophy and American history. They aimed to shape a chaotic set of legal positions into a level playing field and let the politicians play ball.

BY LARRY REIBSTEIN

ILLUSTRATIONS BY STEVE BRODNER

Issacharoff, by contrast, had rolled up his shirtsleeves working as a voting rights lawyer. He was born in Buenos Aires, Argentina, moving to the United States with his family when he was five and eventually settling in Manhattan. He graduated from SUNY Binghamton in 1975, having majored in history, and spent a year studying at the Université de Paris. At Yale Law School, Fiss recalls, Issacharoff “disagreed with almost everything I had to say and yet I hired him as a research assistant and learned from him ever since.”

After graduating in 1983, Issacharoff focused on minority voting rights and labor law at firms and organizations including the Lawyers’ Committee for Civil Rights Under Law and the Lawyers’ Committee for International Human Rights. As a law student, he represented clerical employees in front of the National Labor Relations Board in their successful effort to unionize. In 1989, he joined the faculty at the University of Texas at Austin School of Law.

It was at Texas, in 1992, that Issacharoff got an idea (inspired by Georgetown University Law School Dean Alexander Aleinikoff) to organize a conference on government, constitutional law and politics. Among the attendees was Pildes, who had studied electoral topics for years but was, he relates, “groping for a specific way into those issues that seemed fresh, that hadn’t been explored in lots of depth.” Also there was Karlan, then teaching at the University of Virginia School of Law. She had gone to Yale Law School at the same time as Issacharoff, and had met Pildes while both of them were clerking at the Supreme Court, she for Justice Harry Blackmun.

Issacharoff recalls that it became apparent at the conference that they were exploring a new and distinct area of the law, though never stated so explicitly. Pushed by Aleinikoff again, they decided that a good way to organize the still-inchoate Law of Democracy idea was to gather case material that would be used for teaching—material that was to become the core of their textbook.

Their timing was exquisite. Democracy and how it should be structured were hot in the 1990s, giving them plenty to chew over. In a series of cases, the Supreme Court raised the visibility of what democracy meant by increasingly applying the Constitution to matters involving redistricting, term limits, campaign financing, and the like. The world, meanwhile, was going through a frenzy of democratization, from the former Soviet Union to Latin America, South Africa and parts of the Middle East. More new democracies were formed than in any comparable period, Pildes points out, raising real-life questions about how to design democratic institutions. “All of this kept pushing these issues onto the agenda in ways that were not thought about much before,” Pildes says.

The authors were drawn at first to the theories of John Hart Ely and his groundbreaking 1980s book, *Democracy and Distrust*, according to Issacharoff. Ely worried about overreaching judicial activism, citing decisions like *Roe v. Wade*, and he tended to put more emphasis on the process of law-making rather than on the theory. This was an idea they thought could be carried over to the world of democratic politics: Courts should protect the process or structure of politics—making sure no one was shut out before the first ballot is cast—rather than wade in too heavily to determine what is a “good society.”

A more conservative view, to be sure, but more transformative to society, Issacharoff contends: “More has happened to advance

the cause of black people as a result of making sure there is active black representation in Congress and legislatures than as a result of the more aggressive court cases that have sought to deal with things like poverty.”

Issacharoff churned out a series of papers throughout the 1990s as he delved into the topic. In a 1993 *Texas Law Review* piece (“Judging Politics: The Elusive Quest for Judicial Review of Political Fairness”), for example, he challenged the conventional wisdom that gerrymandering corrects itself. In that view, political parties that attempted to control as many districts as possible risked losing, should a small percentage of voters shift allegiances. In 1995, he set the stage for his argument that the Constitution was limited in analyzing voting rights disputes (“Groups and the Right to Vote,” *Emory Law Journal*, and “Supreme Court Destabilization of Single-Member Districts,” *University of Chicago Legal Forum*).

For his part, Pildes explored general constitutional and legal theory in great depth. In a series of articles, he argued against the idea that constitutional rights give individuals absolute freedom. Instead, he proposed that rights should be seen as regulating government actions, limiting the kinds of reasons for which government can act (“Why Rights Are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism,” *Journal of Legal Studies*, 1998). He also turned to less theoretical areas, studying cumulative voting systems in Alabama in a 1995 paper, “Cumulative Voting in the United States,” in the *University of Chicago Legal Forum*.

A Field of Law?

Defining the Law of Democracy is no easy matter; even Pildes demurred. Yale’s Owen Fiss, who himself teaches a Law of Democracy course, wonders aloud whether the professors have yet to find an “autonomous set of principles” governing election law that would properly constitute a law of democracy, even as he’s convinced that it exists. “The work remains to be done, and that’s the great challenge,” he says.

But Pildes and Issacharoff argue that American democratic institutions aren’t fixed in stone, that they are constructed along the way and that self-interested politicians require policing to make sure they don’t gum up the works. “All the issues we identified—

As Burt Neuborne notes, the professors were asking the overlooked, yet critical, question in election matters: “Is it good for democracy?”

like campaign financing, districting—share a common core around the basic questions of what is the point of democracy, what are the objectives of democracy, what are the tradeoffs when designing institutions,” says Pildes.

And as the professors saw it, the Supreme Court certainly wasn’t doing a great job in sorting it all out. The courts’ tendency to apply constitutional law and abstract principles of individual rights to resolve electoral disputes was, they said, mostly a mess. Without a unifying vision, courts created a mishmash of cramped, sometimes illogical rulings.

"Cases that involved campaign finance were treated as First Amendment cases," says Issacharoff. "Cases that involved restricting, like *Baker v. Carr*, would be treated as equal protection." And the courts threw up their hands in futility when it came to cases testing the power of political parties. "[Individual rights] is an abstract, philosophical way of thinking about these issues that just doesn't have any traction for dealing with the real-world problems that this area addresses," says Pildes.

It was better, they said, to think more pragmatically about these matters—meaning to consider the consequences when resolving legal issues surrounding democratic politics. And in weighing

acknowledging but rejecting critics who say their model will invite an overly aggressive judiciary. He compares the role of courts to a cancer drug, targeting pathology in the democratic system but hopefully not destroying healthy tissue.

The article set off a firestorm. It was, so it seemed, attacking the sacrosanct paradigm of individual rights and substituting a managerial concept, using business school words like anti-trust and lockup. Critics said it wasn't asking enough about what is right or moral. Pildes notes that many scholars "don't want to think about rights necessarily having trade-offs against other objectives. You know, rights are rights."

Some very prominent academics fall in this camp. Legal philosopher Ronald Dworkin, while a huge admirer of the two professors, notes that the trend to employ the economic model in legal analysis can indeed be overused. Trying to discern commonality between the wants of voters and consumers can be misleading, he says. Harvard's Thompson, who makes extensive use of the textbook, likewise cautions: "In the market, if we don't like a product we can buy a different product. In an election, the competition ends in a decision and we have to buy the product—no matter how competitive it is."

Neuborne, despite his left-leaning political credentials as a former ACLU legal director, says he wasn't bothered by the marketplace metaphor. "There's nothing inherently right-wing about viewing things as markets," he says.

"When there's market failure in democracy, viewing it as a market is a left-wing thing because it means you have to step in and correct the market."

Today, says Issacharoff, the politics as marketplace idea is mostly considered conventional wisdom. "We went from being, 'This is outlandish and ridiculous,' to 'This is just old stuff,'" he says, laughing. "I wanted a brief moment when we were 'sober and thoughtful.'"

Bush v. Gore

If there was ever a time when an ivory tower concept suddenly became relevant to the popular masses, it was the 2000 U.S. presidential election. "Florida 2000 was a perfect storm," says Issacharoff. The combination of creaking and dysfunctional election machinery in Florida; a form of review that was "nastily partisan"; the inconsistency between the popular and the electoral college votes, and a confident Supreme Court, unafraid of inserting itself into areas given to other branches of government, made election law the top story of every night's news broadcast. It was also a perfect storm for Issacharoff, Pildes and Karlan to enter the media whirlwind with numerous television appearances. They considered turning their commentary and writings into a popular book on the election that could have elevated their name- and face-recognition in the mass media along with well-known legal experts such as Alan Dershowitz and Jeffrey Toobin. But eventually they decided to write an evenhanded casebook for students and professors called *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000*.

Four years after *Bush v. Gore*, Pildes found himself in the middle of what he calls "*Bush v. Gore 2*." He was representing Puerto Rico's election commission in an eerily similar election dispute that would determine the next governor of the commonwealth. His opponent: Theodore Olson, who was Bush's lawyer in Florida. The controversy

"We went from being, 'This is outlandish and ridiculous,' to 'This is just old stuff,'" Samuel Issacharoff says, laughing. "I wanted a brief moment when we were 'sober and thoughtful.'"

those questions, Issacharoff and Pildes suggested separately, courts should view politics not as a clash of states vs. constitutional individual rights, but as a competitive marketplace.

They unleashed this metaphor in February 1998 in "Politics as Markets: Partisan Lockups of the Democratic Process," published in the *Stanford Law Review*. Does a law limiting campaign contributions, for example, lead to a robust marketplace of candidates—or does it lock out potential aspirants? By viewing the issue that way, it was no longer a fuzzy First Amendment case about restrictions on political speech. As Burt Neuborne, Inez Milholland Professor of Civil Liberties and legal director of the Brennan Center for Justice, notes, the professors were asking the overlooked yet critical question in election matters: "Is it good for democracy?" Or as Pildes puts it: "I think the fundamental question ought to be, Is this rule a means of stifling political competition or not?"

The backbone to their marketplace approach is this: The biggest threat to a democracy is the tendency for incumbents to lock up the political process so they can't be effectively challenged. "Inherent authoritarianism," Pildes calls it.

"The term 'lockup' was deliberately chosen," says Issacharoff, who spent a year at Columbia studying corporate governance theory, "because it's a term of art in corporate governance law—where management makes it impossible to dislodge it. We were trying to say the same thing happens in the public domain, for example, difficulty in getting a third party at the ballot, difficulty in challenging incumbents in a primary."

When should the judiciary step in to unlock the door? Judges, they said, should aggressively scrutinize laws such as gerrymandering that appear to entrench and protect politicians. Otherwise, when laws are only reshuffling democratic rulemaking—as in those involving primaries, for example, that don't entrench one set of insiders over another—they should back off. Of course, figuring out where to draw the line here is no easy trick, Pildes says,

again was over whether certain ballots were valid. "I had this surreal experience of arguing against Ted Olson about what *Bush v. Gore* means," Pildes recalls. Olson wanted the courts to intervene to halt a recount and have the ballots thrown out (sound familiar?). Pildes won the case, the ballots were counted and the candidate who benefited, Aníbal Acevedo-Vilá, is the current governor.

Real World Applications

Taught at the Law School by Issacharoff or Pildes since 2002, the upper-level Law of Democracy course starts with issues involving individual political participation—the right to vote, for instance—and then moves on to the role of groups in politics—parties, primary elections and the like. But to some extent, this is a course where the syllabus is ripped from the headlines. Pildes and Issacharoff dive into subjects that are in the news and apply their sometimes-unique perspectives, which are often ripe for debate among their colleagues and even between themselves. This being a particularly engaging presidential election year, there's no shortage of strong and even clashing opinions.

VOTING RIGHTS AND RACE

The landmark Voting Rights Act of 1965, which prohibited states from adopting policies that disenfranchised African Americans, set up extensive federal oversight of jurisdictions with a history of discriminatory practices. But some 35 years later, Issacharoff and Pildes suggested that federal intervention could be dialed back, because the political process in those states and districts—the marketplace—was now open to minorities. This view, Issacharoff points out, gave integrity to their core argument: Just as courts needed to act when confronting entrenchment, they should back away when the political system was operating fluidly.

That idea came to the fore in the 2003 Supreme Court redistricting case *Georgia v. Ashcroft*, which Pildes calls the most important decision in a generation on race and political equality. Georgia had a Democratic majority but was trending Republican, so the black Democratic majority put together a deal that slightly diluted the concentration of black majority districts, spreading out votes that would shore up Democratic lawmakers elsewhere. Any diminution of black concentration is a *prima facie* violation of the Voting Rights Act, however, so the Justice Department objected.



Pildes argued that the Voting Rights Act ought to be updated to reflect a changed political and racial environment: “Otherwise, the Act becomes a way of entrenching racial identities and a racially polarized form of politics.”

The Court ruled, 5-4, that Georgia’s legislature had the latitude to make the changes. Pildes suggests the Court weighed the case in a pragmatic, process-based way, understanding that blacks had gained political power and thus the Voting Rights Act could be interpreted with more flexibility.

Pildes was able to take special pride in the Court’s reasoning. It explicitly endorsed and cited an idea he had proposed just a year earlier in the *North Carolina Law Review*. He wrote that because whites were now voting regularly for black candidates, it might no longer be necessary to create a majority black election, as required under the VRA. (Barack Obama is proving the point this year in his ability to attract white voters.)

It was the second time that Pildes’s work turned into court doctrine. In 1993, he and political scientist Richard Niemi of the University of Rochester conceived the notion of “expressive harm” in describing the Supreme Court’s view of the constitutional harm done when designing election districts along racial lines. The idea is that the government can inflict harm not only in concrete ways, but also symbolically through ideas and attitudes it expresses. Creating minority election districts, for example, can send the harmful message that members of the same race always share political views. The notion was subsequently employed by the Supreme Court in cases including *Miller v. Johnson* in 1995 and *Bush v. Vera* in 1996, in which the Court ruled that redistricting plans in Georgia and Texas, respectively, were gerrymandered to hurt minority groups.

Following *Ashcroft* and several other Supreme Court rulings on voting, Issacharoff weighed in with a 2004 piece that also pivoted on the idea that blacks were gaining ground: “Is Section 5 of the Voting Rights Act a Victim of Its Own Success?” Issacharoff’s *Columbia Law Review* article suggested that African Americans had made such gains in the political establishment that Section 5, which required close federal scrutiny for certain districts, had served its purpose—and in fact might be impeding the now-robust political process.

Two years later, in 2006, Pildes and Issacharoff testified before Congress when Section 5 was up for renewal. Pildes argued the section ought to be updated to reflect the changed political environment that now allows, for example, black-white political coalitions. “Otherwise, the Act becomes a way of entrenching racial identities and a racially polarized form of politics,” he says. Issacharoff, too, testified that the Act was out of date and voiced concerns that it could be

exploited for partisan gain. (Their colleague Karlan disagrees, saying the section is still needed in those local election areas where two strong parties don’t exist.) In the end, however, Congress voted to renew the measure with no changes.

POLITICAL PARTIES

The presidential primary season is an apt real-life lesson for students of the Law of Democracy—and specifically the role of political parties. Notice, says Pildes, how Barack Obama and John McCain generally fared better with open primaries, in which voters were free to choose for which party they want to select their candidate. Hillary Clinton did better when only Democrats were permitted to vote in their closed primaries. With open primaries, we generally tend to get more moderate candidates; close them and we get more extreme candidates.

Pildes’s point: A seemingly small, technical rule governing primaries can have enormous consequences for democracy. So who should set the ground rules when disputes arise involving political parties? Generally, let the politicians fight it out in the public arena, he says. Yet the Supreme Court has been intervening of late, generally barring states from regulating how political parties structure themselves.

In its 2000 decision *California Democratic Party v. Jones*, for example, the Court ruled California’s open primary system unconstitutional on individual rights grounds—a political party, like a private club, has the right to decide its members and who can vote in its primaries. Pildes says the Court once again was wrong to try to invoke the Constitution to settle a matter that should be subject to the back-and-forth of legislative debate—and one that did not involve entrenching one set of insiders over another. The danger, he says, is that the Court could “freeze into place its own vision of how democracy should function.” Indeed, it’s possible that the *Jones* decision could make it unconstitutional for states to require parties to let independents vote in their primaries. “That would have far-reaching ramifications for the future of American politics,” he says.

CAMPAIGN FINANCE

As Issacharoff sees it, much to his dismay, today’s law school students are fixated on the need for campaign finance reform—specifically, in favor of public financing. “They are as naïve and myopic as the editorial board of the *New York Times* on this issue,” he declares. Breaking from liberal orthodoxy, Issacharoff (and Karlan) prefers, in short, that virtually all campaign finance restrictions be thrown out except for those requiring disclosure of contributors. “You raise money any damn way you want,” he says. “The media would expose stuff; I think that’s far better.”

Issacharoff and Karlan described the existing system—which restricts contributions but leaves expenditures wide open—as “taking a starving man to an all-you-can-eat buffet but giving him only a really tiny spoon to eat with.” Their 1999 article in the *Texas Law Review*, “The Hydraulics of Campaign Finance,” caused a stir with its dim view of campaign finance regulation. Comparing election money to water, they argued that shutting off one avenue only diverts it to another—the unintended consequence problem. Regulate money to political parties and it goes to parallel organizations, like political action groups or independent 527 groups (named for a section of the tax code). “Our view is it’s actually much better if

the money goes to the candidate,” says Issacharoff. “Because then somebody running for office is actually accountable.”

If it's any consolation to students, Pildes thinks Issacharoff and Karlan's idea is “wacky”; it is closer to Justice Clarence Thomas's view that the First Amendment's freedom of speech bars any kind of regulation of campaign contributions. Pildes argues the Supreme Court ought to give room to lawmakers to set rules, given the vigorous public debate on a clearly crucial issue. “The position that the Constitution just cuts that off, and says nothing is permissible in regulating the system, seems to me a very troubling thing in a democracy,” Pildes says. But if legislators make laws that act to entrench themselves, then of course courts should intervene on grounds they are anticompetitive. In any case, Pildes argues that this debate is just playing at the margins until something really radical happens—meaning public financing of elections. But that, he notes, isn't happening anytime soon.

But Burt Neuborne thinks something radical did happen this year that could have a monumental impact on the campaign finance issue: Barack Obama's remarkable success in using the

Internet to raise vast amounts of money in small increments, an average \$91 per person. This form of individual fundraising, if replicated in coming years, Neuborne says, could ultimately negate the problem of big money's undue influence on elections. “Technology may solve something that the law couldn't,” he says.

PARTISAN GERRYMANDERING

After the 2010 census, legislators will sit down to draw the boundaries of state and congressional districts. Lawsuits will inevitably flow, claiming one unfairness or another. Issacharoff thinks the system is absurd. In a 2002 paper called “Gerrymandering and Political Cartels,” Issacharoff suggested that all such plans drawn by insiders are self-evidently unconstitutional. He proposed instead that districting should be taken out of the hands of self-interested incumbent politicians and be placed into an independent commission or even a computer. Many countries, including Great Britain, Canada and Australia, use outsiders for this purpose.

The problem of self-interested districting arises most acutely in bipartisan gerrymandering in which, for instance, incumbent

Neuborne Takes Campaign Financing Reform to the Supreme Court

Burt Neuborne is no mere observer of campaign finance issues. The founding legal director of the Brennan Center for Justice, he played an important role in the legal defense of the landmark McCain-Feingold campaign finance law. The 2002 law bans unlimited, “soft money” contributions to political parties and restricts political advertisements by unions, corporations and advocacy groups in the weeks leading up to elections.

In the mid-1990s, recalls Joshua Rosenkranz, then the director of the Brennan Center, Neuborne “had this instinct” that campaign finance reform would be the next hot development in election law. The center began developing ideas and positions, setting itself up as a kind of general counsel to the reform movement. A few years later, Rosenkranz was asked to join a small group of legal scholars who drafted what became the McCain-Feingold bill. He played the dominant role in writing the section on advocacy ads.

Neuborne remembers that as soon as the bill was introduced, it was attacked furiously from both the left and the right on First Amendment grounds. As the bill floundered, Senators John McCain and Russ Feingold had Neuborne hold a press conference to defend the measure. The strategy was: if Neuborne, a longtime, well-known fighter for the First Amendment and former legal director of the American Civil Liberties

Union, would stake his reputation on the bill's constitutionality, it's got to have merit. Neuborne also rounded up 14 former ACLU executives to publicly support the measure as a means of neutralizing ACLU opposition. That maneuvering, he says, helped keep lawmakers on board, leading to passage.

When the law was challenged in court, the Brennan Center put together a team, led by Rosenkranz and including Neuborne and Brennan Senior Counsel Frederick A.O. Schwarz Jr., to defend the measure. Their assignment was specifi-

cally *u. FEC* in a 5-4 decision in December 2003. Says Neuborne, “The case was won not at the level of brilliant theoretical arguments, but what we did is build a record that made it impossible to overturn.” As for the law's impact, he insists it's been a total success in eliminating corporate money from political campaigns. In 2007, however, the Court seemed to gut the segment on electioneering by allowing certain ads from interest groups. The 5-4 decision in *FEC v. Wisconsin Right to Life* was seen as a rebuke of McCain-Feingold.

Neuborne remains optimistic: “What I thought was a real defeat doesn't appear to be playing out on the ground that way,” he says, explaining that the unions,

“The case was won not at the level of brilliant theoretical arguments, but what we did is build a record that made it impossible to overturn.”

cally the section on electioneering. They commissioned studies on election ads and tracked campaign contributions from big donors to build the argument that the old law was corrupt, allowing phony issue ads to creep in that were really aimed at altering the outcome of the election.

Citing the gritty evidence of campaign finance end-runs and loopholes, the Supreme Court upheld the law in *McConnell*

corporations and advocacy groups the electioneering passages specifically targeted don't seem to be using the Court's decision as a loophole. “The truth is [the 2007 decision] is a useful safety valve that allows small groups that really are talking about issues to get an exemption and not have to worry about violating the Act,” Neuborne explains. But he cautions only time will tell whether this remains true.

legislators strike deals to put all the Democrats in safe districts and Republicans in others. In New York State, for example, party leaders essentially agree to gerrymander state districts to ensure that Democrats control the Assembly and Republicans, the Senate.

Bringing this system down is tricky. No one is being denied the right to vote, he notes, so it's hard to claim some individual right has been violated. But Issacharoff says the court should not ask about rights violations, but instead should ask a "process" question: Is it presumptively unconstitutional to give incumbent lawmakers the power to determine electoral arrangements?

Issacharoff concedes his idea to strip lawmakers of districting powers is pushing the boundaries. "Rick has characterized this as an approach that even the Warren Court in its heyday would blanch at," he says with a grin. To be sure, Pildes generally prefers independent commissions, too. How to get to that goal is another matter. "Sam's idea that the courts should order this across the country is, to put it charitably, provocative and, to put it in practical terms, completely off the deep end," he says. It would be far better if popular pressure gave rise to independent commissions, he says, rather than to have it "forced down our throat" by the Supreme Court. On the other hand, Pildes says courts have done "virtually nothing" about partisan gerrymandering—the very essence of politicians locking themselves into power.

Agreeing with Pildes, University Professor Jeremy Waldron, who tends to view electoral issues through a philosophical prism, recommends a system used in his native New Zealand that accommodates the indigenous Maori people, about 10 percent of the population. The problem with ethnic or race-based districting, he says, is "it freezes peoples' identity or it makes assumptions

about peoples' identity," he says. In New Zealand, the Maoris are guaranteed an opportunity to vote in specially constructed districts, but every eight years they can select whether to register in the special or a regular district. If not enough Maoris choose the special district, it disappears, and the Maoris are absorbed into the regular district. "This leaves it in the hands of the people concerned," Waldron says.

EMERGING DEMOCRACIES

Following *Bush v. Gore* and 9/11, Issacharoff says he and Pildes grew more interested in issues like how to administer a democracy, and how to define and set limits on executive authority. That led them to look abroad. Says Issacharoff, "I realized that I was quite uninformed on how other countries address these issues."

Issacharoff was not in the dark for long. In a 2007 *Harvard Law Review* article called "Fragile Democracies," he explored how democratic countries should deal with serious threats by antidemocratic groups that exploit the electoral arena to push their cause. One need only look at Hitler's rise using democratic means. And there was plenty to study today—Turkey banning Islamic parties, Israel banning parties that deny the Jewish nature of the state, India removing candidates from office who appealed to religious or ethnic hatreds, and others. In America, courts generally use the "clear and present danger" threshold to weigh government restrictions. Issacharoff suggested that may be too high a bar for less stable countries facing mass threats. Those countries need the ability to crack down on such electoral activity without regard to its imminence. The danger, of course, is a power grab by insiders, and thus he says that his pro-competitive approach "would dictate a great deal of caution."



Neuborne called the piece a “pragmatic argument for minimalism”—meaning democracies in time of stress could interfere with individual rights, yet they needed to think hard about keeping the change minimal. Still, it was controversial, he says, in even allowing some kinds of abridgements of rights. “I’m an ACLU person, so I dig in and fight,” he says. “But maybe you need somebody like me and, at the same time, Sam, who’s building a position beyond which we won’t move.”

In a book chapter entitled “Identity and Democratic Institutions,” Pildes took a comparative approach, looking at how countries with sharply divided heterogeneous societies—like India, South Africa and Iraq—deal with designing democratic institutions. One common mistake: Designers assume that the conflicts among competing groups are fixed and unchanging, so they set up government in a way that—surprise, surprise—only entrenches those identities. Yet countries and societies are fluid, and the best systems design for that. An obvious example: the United States and federalism, which accommodates regional preferences and changes. In Iraq, designers at least set up a rotating presidency among the three major groups as an interim measure to navigate tension. Interim power-sharing was also done in South Africa after apartheid.

Similar issues of fragile democracies were in the Constitutional Democracies colloquium run by Issacharoff, Pildes and Pasquino. Roughly 30 students heard presentations from speakers including justices from courts in Germany, France and Israel. “It was an important event,” says Pasquino, exposing students to views from justices around the world. He notes that Europe doesn’t have many academics like Issacharoff and Pildes who specialize in election law. The reason, he says, is that in countries like France and Italy, only one national law governs the electoral process—unlike the 50 different laws in the United States. But democratic design is an important topic these days in Italy, which is debating switching from a proportional system of electing representatives to an American-style majoritarian one. “A coalitional government is a huge problem,” says Pasquino, who favors the switch. “It’s indecisive, and if you have 20 parties, it’s hard to attribute responsibility.”

ELECTIONS ABROAD

In U.S. domestic politics, elections always appear to be a good thing, the exercise of individual rights to influence how to run the nation. But this doesn’t necessarily translate overseas, especially when ill-prepared countries with new democracies rush to hold elections. Issacharoff criticizes American foreign policy in recent years as “hold the goddamn elections someplace at some time and the outcome be damned.” That policy has only exacerbated tensions in places like Iraq, Palestine and Kazakhstan. A presidential election, he says, needs to be preceded by such things as functioning parliamentary institutions, some judicial counterweight and human rights monitors. Otherwise, “an election can be a referendum on who’s going to use state power to suppress everyone else, and that’s not a democracy,” Issacharoff says.

In a *Washington Post* opinion piece published in 2005, Issacharoff argued that what defines a democracy is not the first election but the second. Pildes thinks the rush stems from the “naïve, romanticized” image of democracy held by many people—to wit, all will be fine if we can get citizens just to speak their minds and vote their preferences.

Trying to export Western-style democracy generally is fraught with dangers. Walter E. Meyer Professor of Law Stephen Holmes, who has written extensively and consulted on emerging democracies in Eastern Europe, also has little time for people who “pretend to be experts” and go around the world selling their services as constitutional or electoral engineers. “You can more easily unplug an appliance in New York and plug it in in Moscow,” Holmes says, “than you can unplug our due process system and put it in Moscow.” He recalls how, in the early 1990s, some American lawyers grew concerned that Albania was removing judges without cause.

“You can more easily unplug an appliance in New York and plug it in in Moscow,” Stephen Holmes says, “than you can unplug our due process system and put it in Moscow.”

They went there and had the law rewritten to prevent that. So the Albanians starting putting judges in jail instead.

What’s critical is a thorough understanding of the informal networks that determine whether a country functions well or not. In Iraq, for example, Holmes says the United States lost three to four years insisting it would negotiate only with elected officials rather than tribal leaders. “This was a case of trying to export democracy, which blinded us to the elementary building blocks of a negotiated settlement in Iraq,” he says. Similarly, he ponders whether having an election today in Pakistan would make their handling of nuclear weapons more or less safe. “You can’t assume you know the answer,” Holmes said.

To say that the only legitimate leaders are those elected “shows a zero understanding of world history,” Holmes contends. “Most leaders throughout history have not been elected, and they have been as effective or ineffective as elected ones.”

Waldron, on the other hand, is not so quick to question elections. Of course, he says, it makes little sense to have elections without traditions like mutual tolerance and a culture of deliberation. But he argues that peoples’ urge to participate in elections is strong—witness Iraq or South Africa—and should be respected. “What I definitely reject is the view that the electoral dimension of democracy is a sham, or just icing on the cake,” Waldron asserts.

Such rigorous discussion underscores how important Law of Democracy is and will continue to be in domestic and world politics. Change, whether it be in the form of a new democracy created or an established democracy like the United States facing the real possibility of electing its first black president, seems an integral element of our times and for the foreseeable future. And you can bet that Samuel Issacharoff and Richard Pildes will continue to insert their idiosyncratic views into the global debate. □

Larry Reibstein is a New York journalist who has previously written about law and philosophy for the magazine.

FOLLOW THE NUMBERS

Empirical Legal Studies is a relatively new trend in legal scholarship that applies scientific method to legal data. Almost two dozen faculty at the Law School have embraced this effort to test legal theory with real-world evidence. Among them, Jennifer Arlen and Geoffrey Miller are helping to spark a revolution across the legal academy.





FEW YEARS AGO, JOSEPH PRICE, then a graduate student in economics at Cornell University, began building a database of basketball statistics. Price was interested in the relationship between incentives and performance, and he wanted to see whether professional players played better when their contracts were on the verge of expiring. At the time, Price also happened to be reading *Blink*, the best-selling book by Malcolm Gladwell, which includes a chapter arguing that most people harbor deep-seated, racist attitudes that affect their behavior. As Price read *Blink*, he realized that his basketball data—which included box scores from individual N.B.A. games—could be used to test Gladwell’s theory. Was it possible, Price wondered, that referees treated players differently depending on their race?

Price, now an economics professor at Brigham Young University, ended up collaborating on the research with Justin Wolfers, an economist from the Wharton School at the University of Pennsylvania. They analyzed every game over the previous 13 seasons, and they concluded that the answer to Price’s question was a clear yes. Holding all else equal—a player’s position, the location of a game and numerous other factors—the professors found that an all-white refereeing crew called between 2.5 percent and 4.5 percent more fouls per game against a black player than a white player. (Black referees, for their part, were more likely to call fouls against white players than black players, though the pattern wasn’t as strong.) “Basically,” Wolfers was quoted as saying in a front-page *New York Times* story last year, “it suggests that if you spray-painted one of your starters white, you’d win a few more games.”

Neither Wolfers nor Price is a lawyer, and their paper wasn’t about the law. But it did deal with the application of rules by judges, albeit basketball judges. And it addressed an issue that is central to many of today’s most contentious legal debates—namely, the extent to which race continues to play a quiet role in the administration of justice. So the paper became a main attraction at a conference that drew nearly 450 scholars to the NYU School of Law in November. They came for the second annual Conference on Empirical Legal Studies, where they reveled in law schools’ newfound interest in real-world, data-driven research. More than 100 papers were presented, on topics ranging from the impact of voter-identification laws to the pervasiveness of corporate fraud to the role that race plays in sentencing.

EMPIRICAL LEGAL STUDIES, OFTEN REFERRED TO AS ELS, has become arguably the hottest area of legal scholarship today. Attendance at the November conference, organized by professors Jennifer Arlen and Geoffrey Miller of NYU Law, was almost twice as high as at the first conference, held at the University of Texas in 2006. A new journal—*The Journal of Empirical Legal Studies*—began in 2004 and now accepts less than one in 10 of the submissions it receives.

NYU, meanwhile, has become one of the centers for this new brand of empirical work. Almost two dozen members of the faculty, including Lily Batchelder in tax and social policy, Vicki Been ’83 in real estate, Marcel Kahan in corporate law, Florencia Marotta-Wurgler ’01 in commercial law, and Stephen Choi in securities law have published empirical studies in the last few years. And Arlen ’86 and Miller have played a broader role, by helping turn the recent burst of research into something of a formal movement.

In 2006, the two professors joined with Bernard Black of the University of Texas School of Law and Theodore Eisenberg and Michael Heise of Cornell Law School to build upon the foundation created by the *Journal of Empirical Legal Studies* two years earlier. They started the annual conference and founded the Society for Empirical Legal Studies. Arlen and Miller became the founding copresidents of the society. "They're very important players," said Heise, who serves as coeditor of the *Journal*. "They're engaged in their own work, and they've also taken on leadership roles to increase the visibility of the Empirical Legal Studies movement."

Each has done work that has overturned preconceived notions. Miller, Stuyvesant P. Comfort Professor of Law, came to NYU from the University of Chicago in 1995 and specializes in corporate law. In 2004, he published a paper in the then-new *Journal of Empirical Legal Studies*, with Theodore Eisenberg, that set the conventional wisdom about class-action lawsuits on its ear. While legislators such as Senator Orrin Hatch were decrying "jackpot justice, with attorneys collecting the windfall," the authors found the average size of class-action settlements had not, in fact, risen over the previous decade. The size of attorney's fees in such lawsuits hadn't risen, either. This, the professors dryly noted in their paper, "is not the sort of fact we are accustomed to hearing."

Arlen, Norma Z. Paige Professor of Law, has taken a special interest in the sentencing guidelines governing corporate criminal liability. In the 1990s, the U.S. Sentencing Commission adopted sentencing guidelines that constrained judges in most cases to impose higher fines on corporations convicted of crimes. In 1999, Arlen and two coauthors found that in the years after the guidelines were adopted, corporate sanctions increased dramatically, but they also determined that the legal constraint on the judges was unnecessary. It seems that federal judges voluntarily heeded the call to increase corporate sanctions, whether or not their cases fell under the new guidelines. In 2005, the Supreme Court ruled in *United States v. Booker* that sentencing guidelines are no longer mandatory.

"The real importance of ELS," Arlen said, "is that it enables us to formulate legal policy based on the real problems that exist in the world, not the problems we think might exist, based on our ideology." The field, she added, "gets us away from anecdotes and from making policy based on which anecdote you believe."

The empirical work on medical liability, for example, is helping to shift the debate about the role of medical error in health care. For all the talk about the soaring malpractice costs, research has shown that the main problem isn't frivolous lawsuits; it's widespread medical error. In 2006, for instance, Michelle Mello, an associate professor of health policy and law at the Harvard School of Public Health, testified before a U.S. House subcommittee that "only three to five percent of patients who are seriously injured by medical negligence file malpractice claims and less than half those who claim receive compensation." In fact, other studies show that patients face a substantial risk of medical error—and support Mello's finding that only a small fraction of those injured file lawsuits.

THE 20 OR SO NYU LAW FACULTY WHO EMBRACE ELS ARE applying their data-crunching skills to other front-page issues, too. Associate Professor of Law and Public Policy Lily Batchelder, for example, testified before the Senate Finance Committee in March about the spottiness of the estate tax. Some individuals who receive extraordinarily large inheritances bear little or no tax burden, Batchelder said, while a small number who inherit relatively small amounts bear substantial tax burdens. Given that the estate tax is scheduled to disappear in 2010 but return in 2011—and that policy makers are likely to fix this oddity in some way—they have a good opportunity to make the tax fairer in the process. In effect, Batchelder is nudging the Senate to get beyond the usual ideological debate over the estate tax and to consider practical matters as well.

In May, Vicki Been, Elihu Root Professor of Law and director of the Furman Center for Real Estate and Urban Policy, testified before the House Oversight and Government Reform Committee's domestic policy subcommittee about the effects the current wave of foreclosures are having. Been and two coauthors examined sales of properties surrounding foreclosed homes, and concluded that foreclosures significantly depress the sales prices of nearby homes. But what excited Congress and the media more is that a wholly innocent segment of the population has been adversely affected by the mortgage crisis: renters. In New York City, the Furman Center report documents, 60 percent of properties entering foreclosure in 2007

were two- to four-family or multifamily buildings, representing at least 15,000 renter households. (To read more about this report, see page 104.)

As Arlen notes, the empirical-research movement aims to replicate the scientific methods of the medical sciences. In those fields, researchers can investigate cause-and-effect relationships through randomized trials; some patients are given a drug, some are not, and outcomes are compared. But such trials aren't feasible

in much of the legal world. A judge can't vary prison sentences, for instance, in order to see the effect that time behind bars has on recidivism. When legal researchers want to determine the effect of a legal change on states, they must rely on sophisticated statistical analysis to distinguish the effect of the law from other influences.

In fact, the main reason for the rise of empirical work is simply that it's far easier to do now than it once was. Computers can crunch reams of data and allow researchers to tease out the correlations—between, say, a defendant's skin color and his sentence length—that once would have remained hidden. "You can do work on your laptop today," Miller says, "that would only have been possible on a mainframe 15 years ago."

But the empirical movement has also come along at a serendipitous time in the intellectual cycle. The legal fields that were growing in the 1980s and 1990s don't have quite the energy that they once did. These fields included law and economics (which mostly attracted professors on the right side of the political spectrum) and critical legal studies (which attracted those on the left). By the current decade, the arguments of those fields no longer seemed so new, and young professors discovered that they could more easily make their mark not by offering new theories to explain the world but by investigating what was actually occurring.

"The real importance of ELS is that it enables us to formulate legal policy based on the real problems that exist in the world, not the problems we think might exist, based on our ideology," says Jennifer Arlen. ELS "gets us away from anecdotes and from making policy based on which anecdote you believe."

Barry Adler

Bankruptcy, Corporate Finance

Jennifer Arlen

Corporate Crime, Experimental Economics

Oren Bar-Gill

Consumer Contracts

Rachel Barkow

Practice of State Prosecutors

Lily Batchelder

Tax, Inherited Wealth, Income Volatility

Vicki Been

Subprime Mortgages and Foreclosures,
Land Use Regulation, Housing Investments

Oscar Chase

Judicial Ceremony

Stephen Choi

Securities Litigation and Arbitration,
Judicial Performance

Kevin Davis

Economic Development

Barry Friedman

Courts, Judicial Behavior, Jurisprudence

Helen Hershkoff

Health Care, Education in Developing Nations

Samuel Issacharoff

Political Party Regulation in Foreign Nations

Marcel Kahan

Finance, Corporate Law

Lewis Kornhauser

Economic Analysis of Law

Florencia Marotta-Wurgler

Commercial Contracts

Geoffrey Miller

Commercial Contracts, Class Action Attorneys'
Fees, State Supreme Courts

Richard Revesz

Judicial Behavior

Cristina Rodríguez

Immigration-r

elated Legislation

Stephen Schulhofer

Policing in Muslim-Diaspora Communities

Catherine Sharkey

Tort Reform

MILLER NOTES THAT THE MOST COVETED FACULTY recruits once had to just be fantastically smart lawyers, like Supreme Court clerks; today, the schools want not only brain power, published papers and impressive credentials, but also research experience in the social sciences. "There have always been people who looked at data, at least since the 1930s," he said. "But in the last 10 years, it's become probably the most important development in legal studies."

ELS has made ripples in Washington, as Batchelder's and Been's appearances before Congress suggest. And some of its findings—like those on the prevalence of medical error—have helped support efforts to change policy. But the field's overall effect on policy—a clear goal of ELS proponents—has been tricky to measure. Part of that is merely a reflection of the field's youth. But part of it, some scholars say, stems from the fact that doing truly unassailable empirical research is so difficult. "The question is, 'How good is this stuff?'" said noted legal theorist and law-and-economics proponent Richard Epstein, a visiting professor at NYU who attended the November ELS conference, but has not done empirical work himself. "I have mixed emotions."

The main reason for the rise in empirical work is simply that it's easier to do now. Computers can crunch reams of data and allow researchers to tease out correlations that once would have remained hidden.

"You can do work on your laptop today that would only have been possible on a mainframe 15 years ago," says Geoffrey Miller.

One problem is finding enough relevant data. As Arlen says, "We have too little data to examine many of the issues we care about." Another is designing a study that enables researchers to isolate the effect of a change in the law from all other potential causes of change. As a result, it is not uncommon to get multiple studies of the same topic with differing results. The best example may be the recent dueling studies over the effect of the death penalty, which have been covered in the mass media. Some studies have confidently declared that the death penalty causes a reduction in murders in the states that impose it. Other papers, just as confidently, say that the amount of noise in the data makes it impossible to conclude that the death penalty is a deterrent.

Yet there is also a broad swath of work that gets nearly universal praise even from skeptics like Epstein. In the end, then, the way forward certainly involves more empirical work, so that the compelling research can ultimately win out over the flawed studies—and so that legal scholars, lawyers, judges and policy makers can get a better understanding of how the law actually affects people in their day-to-day lives.

"Theory is just theory," as Miller says, "but data is something policy makers take seriously." □



Faculty Focus

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Peggy Cooper Davis, John S.R. Shad Professor of Lawyering and Ethics, won a University 2007 Distinguished Teaching Award. For details, turn to page 35.

To the Teacher, Legal Legend and Man



THE ONLY SURPRISE AT THE APRIL dedication of the 2008 *NYU Annual Survey of American Law* to Anthony Amsterdam was, as the journal's Editor-in-Chief Benjamin Geffen noted, that the publication hadn't done it years ago.

Current and former students and accomplished colleagues gathered to pay homage to Amsterdam's legend—as a leading law professor, advocate and litigator for capital defense and other civil rights causes. But more so, their tributes honored the man

with intimate portraits of a teacher, a friend and an extraordinary human being.

Professor of Clinical Law Bryan Stevenson had only the highest praise for his colleague and mentor, who has taught at NYU since 1981. "I don't believe there's any lawyer, any litigator who has had a more profound influence on social justice in this country in the last 40 years," he said, adding, "He is a very uncommon person."

Nearly everyone mentioned Amsterdam's typical practice of sending emails in

the wee hours of the morning. Seemingly apocryphal stories of legal brilliance—like that cheeky feat of citing a Supreme Court case, volume and page number included, before a skeptical judge, or dictating perfect legal briefs via the phone—were confirmed true. And try as they might to each say something different about the man, all were in awe of his dedication and caring.

David Kendall, known for representing President Bill Clinton during the Monica

Continued on page 35 ▾

Late to the Academy, But Sharing a Lifetime of Learning

CHARLES L. DENISON PROFESSOR OF LAW Emeritus and Judicial Fellow Theodor Meron was chosen to give the American Council of Learned Societies' Charles Homer Haskins Prize Lecture in May to reflect on "A Life of Learning." Indeed, Meron's accomplishments and contributions have not been limited to the academy, as he didn't begin teaching full time until he was 48. Instead, he confessed to the hope "that in some small way these endeavors have

contributed to our thinking critically about how to create a more humane world."

Born in Poland in 1930, Meron lost six years of his childhood to ghettos and work camps, and most of his family to the Holocaust. He emerged from World War II hungry for learning. Later, he became determined to apply his legal studies at Hebrew University, Harvard Law School and Cambridge University to "working in areas which could contribute to making atrocities impossible and avoiding the horrible chaos, the helplessness, and the loss of autonomy which I remembered so well."

Despite the humble tone of his lecture, Meron has made immense contributions—during 20 years as the legal adviser for the Israeli Foreign Service, four years as Israel's ambassador to Canada, a year in the U.S. State Department as a counselor on international law, two years as president of the U.N. International Criminal Tribunal for the Former Yugoslavia and, since 2001, as appeals judge to the Tribunal. As a judge, Meron has felt privileged to write what he calls the "most exciting literature of all,"

the jurisprudence of international criminal law in the "seminal Srebrenica case of General Krstić, for instance, which established that genocide can be committed even in a circumscribed geographical area."

In introducing Meron, ACLS President Pauline Yu emphasized his "sustained effort to move beyond boundaries—both those of nations and of disciplines—to bring people together to explore common concerns and causes." She described him as "a leading figure in the scholarship of international law but also deeply committed to its practice and development today."

Meron attributed his success largely to "chance and seized opportunity," but his belief that crimes against humanity can be avoided is also a factor. He cited from his 2006 book, *Humanization of International Law*: "It seemed to me obvious that repression of human dignity occurs in a continuum of situations of strife, ranging from normality to full blown international wars, and that all these norms must be treated as a whole to provide for a maximum of protection to human beings." □



Lewinsky scandal, began his career working with Amsterdam at the NAACP Legal Defense and Education Fund (LDF) during the mid-1960s. He shared a poem Amsterdam had once included in correspondence as a testament to his wit and playfulness. Former U.S. Solicitor General Seth Waxman, who won a 2005 victory in *Roper v. Simmons*, in which the Supreme Court ruled the execution of juveniles violated the Eighth Amendment, confessed that an additional reward for the privilege of defending death-row inmates is having close access to Amsterdam.

Even though all spoke from vastly divergent places in their careers—from law student to senior partner—all were grateful for Amsterdam's wisdom.

"There's no one in this business that I know of...that works harder than Tony does," said George Kendall, another LDF veteran. "He leads, and teaches by example."

Underscoring Kendall's point were tributes from Amsterdam's former student Dimitri Dubé '05, now a clerk to Judge Theodore McKee of the U.S. Court of Appeals for the Third Circuit, and a current one, Robyn Mar '08. As the most recent beneficiaries of Amsterdam's teaching, Dubé and Mar described the same man his peers had—affirmation of the respect with which Amsterdam treats everyone, regardless of their age or career status.

When the honoree finally accepted his award, he tried to dismiss the kind words. In fact, his short speech exemplified all of the qualities attributed to him—modesty, humor, intelligence and sensitivity. "It's staggering to see so many friends and so many good people so deluded," he said, but as the attendees stood to applaud him, Amsterdam couldn't hide the fact that he was truly grateful and deeply moved. □



Dworkin Tributes Held

PROMINENT LEGAL THEORISTS GATHERED in Norway and New York to honor Professor Ronald Dworkin, winner of the prestigious 2007 Ludvig Holberg International Memorial Prize for outstanding scholarship. (See "Dworkin Wins Holberg Prize," page 7.) Dworkin, who is Frank Henry Sommer Professor of Law and Philosophy at NYU and Emeritus Professor of Jurisprudence at University College London, is renowned for his work tying together philosophy and moral, legal and political issues.

At both day-long events, scholars gave presentations focusing on themes central to Dworkin's work, and he, in turn, commented on each. At the Norway symposium, held last November at the University of

Bergen, Professor Jeremy Waldron explored Dworkin's theory of the role that integrity plays in the law. Waldron, who had Dworkin as his doctoral mentor at Oxford, noted Dworkin sees the legal enterprise as "primarily keeping faith with a coherent body of principle that governs all of us in the exercise of power over one another."

The NYU seminar, in April, included talks from Cass Sunstein of the University of Chicago Law School and Lawrence Sager of the University of Texas School of Law. Sunstein spoke on his long-held view of judicial minimalism, the idea that judges should avoid sweeping pronouncements in their decisions. A few intellectual clashes occurred. In "Social Rights and Legal Interpretation," Sager noted Dworkin's work had influenced him, but took issue with his view that there are no social and economic rights enshrined in the U.S. Constitution.

Dworkin's views also continued to surprise. NYU Law Professor and Vice Dean Liam Murphy, who organized the symposium, said he and others had known Dworkin a long time, yet "we all felt we had learned something new." One example: Dworkin's view about the connection between legal rights and the appropriateness of judicial review. Dworkin was clearly taken by the speakers. "There are many dimensions to the honor I'm receiving," he said at the Norway meeting, "but perhaps the most significant is the character of the people who have come to help us celebrate this occasion, and I'm very grateful." □



Davis Recognized for Teaching

Peggy Cooper Davis, John S.R. Shad Professor of Law, Lawyering and Ethics, was one of four University faculty to receive the 2007 Distinguished Teaching Award, which includes a medal and a \$5,000 grant. Davis, a former New York State family court judge, directs the widely acclaimed first-year Lawyering Program.



Richard Revesz observed that "there are few educators in the country who have thought as deeply or as imaginatively as Peggy about how to bridge the gap between theory and practice," adding that "her influence is felt by every student trained at the Law School, directly or indirectly.

She also provides tireless mentoring and guidance to our lawyering faculty, helping to prepare them for teaching positions at law schools around the nation. Peggy's impact as a teacher and scholar is profound."

"She has been a productive critic of outmoded pedagogical methods and a wise innovator," says Vice Provost for Faculty Affairs E. Frances White. Dean

Regulating Self-Regulation

HOW CAN EMPLOYMENT LAW GUARANTEE fair wages and working conditions and foster employee democracy within the workplace? Cynthia Estlund offered answers to both questions in her inaugural lecture as the Catherine A. Rein Professor of Law, "Corporate Self-Regulation and the Future of Workplace Governance." Regulation works best by encouraging effective self-regulation by firms, Estlund said, and for these internal self-regulatory systems to be effective, they must give employees a genuine collective voice in governance.

The New Deal model of "industrial democracy," said Estlund, looked to unions and collective bargaining to improve wages and working conditions. But dwindling union membership and a 50-year standstill on reforms to American labor laws have left many workers unrepresented and vulnerable to lapses in the enforcement of employee rights and labor standards.

Employment law, Estlund said, can potentially fill this void by promoting new



Estlund, right, with Catherine Rein '68

modes of governance within corporations. Unlike a simple deterrence model that penalizes corporations for wrongdoing regardless of their internal processes, a New Governance approach offers firms a more congenial enforcement regime as long as they can maintain effective internal systems for complying with laws designed to keep workplaces safe and fair. Some examples of regulated self-regulation, Estlund said, are the Federal Sentencing

Guidelines for Organizations and federal anti-discrimination laws, which allow companies to avoid punitive damages for discrimination if they maintain effective compliance and complaint procedures.

"The law promotes self-regulation not by mandating it but by rewarding it," Estlund said. "It is based on a quid pro quo: 'If you put in place effective self-regulatory systems, we'll give you a less punitive enforcement regime.'"

But whether we aim simply to deter violations of the law or, as the New Governance model would have it, to promote democratic responsiveness and internalization of public values, Estlund said, workers must have an independent voice within internal compliance structures—one that not only will protect them from employer reprisals, but also will overcome the collective action problems that workers frequently face in seeking compliance. "If employees become powerful enough to claim their rights under the law," Estlund pointed out, "then they may also become powerful enough to demand more of what they want at work, and to claim a real role in firm governance." □

How to Prevent the Next WorldCom or Enron

IN A SUCCESSFUL EFFORT TO RAISE \$12 billion in capital through the largest bond offerings in American history, WorldCom, a publicly traded telecommunications company, "waved the magic accounting wand" in order to make a \$3.8 billion operating expense in 2001 appear

In "Private Enforcement of the Securities Law," his inaugural lecture as the Murray and Kathleen Bring Professor of Law, Stephen Choi argued that private securities class action suits would help deter companies from engaging in the sorts of risks that caused WorldCom's downfall as well as provide adequate compensation to those whose net worth is wiped out in the process.

Private securities class action suits, however, can be plagued by all kinds of frivolous claims because of plaintiffs' attorneys who "file first and ask questions later," according to Choi. "Many plaintiffs' attorneys may file suit even if there isn't

any smoking-gun evidence of fraud," he said, "in the hopes of scoring a settlement from a company that wants to avoid the hassle of litigation." Congress addressed this scourge through legislation, overriding President Bill Clinton's veto to pass the Private Securities Litigation Reform Act (PSLRA) in 1995. In part, the PSLRA requires plaintiffs to plead with particularity—identifying the alleged

fraud and explaining precisely how they were misled prior to discovery. This law has achieved the desired effect of rooting out frivolous suits while still allowing meritorious suits that lacked the hard evidence prior to discovery to proceed.

Choi urged flexibility, however, in addressing the problem of companies that cook the books. Class action suits are just one method of ensuring accuracy in corporate disclosure. Others include greater enforcement and regulation by the Securities and Exchange Commission, audits by third-party gatekeepers such as independent accounting firms, private securities arbitration, and further reforms of private litigation. The 1998 Sarbanes-Oxley Act, an ex-ante mechanism that requires certification for CEOs and CFOs, Choi said, is another solution, albeit an expensive one for innocent companies. "Ex-ante may be a mechanism, but it's a costly mechanism, to the extent that it doesn't just apply to the fraudsters...but to all companies," he said.

Putting hope in one simple solution, Choi said, might result in greater costs incurred by companies both big and small, valid suits being discounted and honest plaintiffs' attorneys unable to do battle against reckless corporations. □



Choi, left, with Kathleen and Murray Bring '59

as a future capital expenditure. But the following year, WorldCom's internal auditing department revealed the fiscal sleight of hand; the company filed for bankruptcy, and in 2005 former CEO Bernhard Ebbers was found guilty on all counts and sentenced to 25 years in prison. WorldCom eventually paid billions in claims and settlements, and its stock became worthless.

Narula at the United Nations

Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, named Associate Professor of Clinical Law Smita Narula to serve as legal adviser for his mandate. Narula will work in concert with economic, agricultural and nutrition experts to ensure that governments worldwide protect people's right to food, and to identify emerging issues related to that right. The mandate comes at a particularly urgent time as the world experiences a food crisis and the growing emphasis on biofuels strains supply and increases costs.

A significant portion of Narula's scholarship has focused on the right to food. Her paper "The Right to Food: Holding Global Actors Accountable Under International Law," published in the *Columbia Journal of Transnational Law* in 2006, examined the challenges and opportunities found at the intersection of economic globalization, international human rights law and the right to food. Narula's extensive work on the issue of discrimination against the Dalits, members of India's lowest caste and the victims of widespread subjugation, has included discussion of the restriction of Dalits' access to food.



Waldron, University President John Sexton, and Waldron's partner, Carol Sanger

Hornets' Nest: Foreign Law and the U.S. Constitution

IN "TREATING LIKE CASES ALIKE IN the World: The Use of Foreign Law in Constitutional Cases," his inaugural lecture as University Professor, Jeremy Waldron explored the fiery debate in America over consistency—whether there should be "harmonization and standardization of the way human rights are administered in the world, [and if] American constitutional law is part of that enterprise."

In deciding a 2004 flag-burning case, *Hopkinson v. Police*, New Zealand Justice Ellen France referenced the U.S. Supreme Court's decision in *Texas v. Johnson*, in which a law forbidding the desecration of the American flag was deemed unconstitutional since it prohibits freedom of speech. France ruled that Paul Hopkinson's right to free speech was being unjustifiably limited and overturned his flag-burning conviction. Her decision met with no resistance from that country's citizens or its judiciary.

Reactions were the opposite in the United States when Justice Anthony Kennedy delivered his swing-vote in *Roper v. Simmons*, a 2005 case that held it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. Kennedy received death threats; he also was harshly criticized by some justices for citing foreign law in his opinion.

Waldron said that Americans must understand that the Bill of Rights "recognizes many of the core rights that both the international documents and the other foreign charters recognize." He added that these rights—free speech, religious freedom—help shape global human rights law.

"They weren't called 'human rights' when we embodied them in our constitution," Waldron said. "We were pioneers in this common enterprise, and it is odd now that we should have such difficulty in acknowledging this." □

Sylvester J. Petro: In Memoriam, 1917-2007

ON NOVEMBER 10, 2007, FORMER NYU School of Law Professor Sylvester Petro passed away at age 90.

Petro joined NYU as an assistant professor in 1950, shortly after earning his J.D. and LL.M. from the University of Chicago and University of Michigan law schools, respectively. He focused on labor, antitrust and contract law and also taught constitutional law. "Sylvester Petro was an unabashed libertarian, strongly maintaining that government regulation of the economy was undesirable in almost all circumstances," says Frederick I. and Grace A. Stokes

Professor of Law Norman Dorsen, Petro's colleague for 11 years. "He also believed, and here he was in a distinct minority, that federal and state regulatory statutes were unconstitutional as exceeding the power of government."

Dorsen remembers, however, that Petro "made his arguments vigorously but politely and with a certain sense of humor." It is this last characteristic that distinguished Petro's teaching, says former student Harvey Ishofsky '71. "His love for law was reflected in how he taught in classrooms. He was both moving and witty."

According to his family, Petro was a founder of the Conservative Party of New York in the 1960s and a member of the classical liberal Mont Pelerin Society, and worked for the Foundation for Economic Education and the National Right to Work Committee. Among many titles, he wrote *The Labor Policy of the Free Society*, *The Kohler Strike* and *The Kingsport Strike*.

He left NYU in 1972 to join the faculty of Wake Forest University School of Law and taught labor law there until 1978. Petro also directed an institute for labor policy analysis, which has since closed. □

Laurels and Accolades

For their body of work, exceptional scholarship or dedication, our professors are acclaimed by peers and students.

AUTHORS CHOI, KAHAN, MILLER IN CORPORATE TOP TEN

Three Law School professors cowrote three of *Corporate Practice Commentator's* top 10 corporate and securities articles of 2007, voted on by corporate and securities law professors nationwide. Stephen Choi, Murray and Kathleen Bring Professor of Law, cowrote (with Robert B. Thompson) "Securities Litigation and Its Lawyers: Changes During the First Decade After PSLRA," which scrutinizes the effects of the Private Securities Litigation Reform Act of 1995 on securities class-action litigation. In "Hedge Funds in Corporate Governance and

Fellowship Fund to assure that the next generation of law school students and lawyers are committed to social justice." SALT works to increase the inclusiveness of the legal profession, enhance the quality of legal education and ensure all individuals and communities have legal representation.

DWORKIN INDUCTED

Ronald Dworkin, Frank Henry Sommer Professor of Law, was among three NYU professors recently inducted into the American Philosophical Society, an elite scholarly organization founded by Benjamin Franklin in 1743. With around 900

Estlund as "incredibly respected in the fields of labor and employment law....Her body of scholarship is extensive and, most importantly, puts issues of importance in labor and employment law in frequently read and respected publications that are read by scholars and practitioners outside of our field. She is a pleasure to work with...[and] selflessly guided us and gave us advice when we were creating our symposium this year." The award honors the memory of Samuel M. Kaynard '42, a major figure in labor and employment law who worked to increase recognition of the field. "Cynthia Estlund constantly publishes on the aging of the National Labor Relations Board, effects of pregnancy protections (or the lack thereof) on families, and other issues that we find important," said Leonard. "She publishes her articles in prominent law reviews and journals that are read



Choi



Kahan



Miller



Dorsen



Dworkin



Estlund

Corporate Control," Marcel Kahan, George T. Lowy Professor of Law, and Edward B. Rock analyze hedge fund activism and its effects on corporate governance and regulatory reform. Geoffrey Miller, Stuyvesant P. Comfort Professor of Law, and Theodore Eisenberg examine the matter of Delaware incorporation as a choice-of-law and choice-of-forum option in "Ex-Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements."

FELLOWSHIP NAMED FOR DORSEN

The Society of American Law Teachers (SALT) has established the Norman Dorsen Fellowship, the organization's first paid fellowship, in honor of Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law. Camilla McFarlane, a second-year law student at the Catholic University of America (CUA) Columbus School of Law in Washington, D.C., is the first fellow. McFarlane will work with Professor Margaret Martin Barry at CUA. The fellowship trains law students in the work of activist scholars within the legal academy. Hazel Weiser, SALT's executive director, said that "it was Norman's vision that created SALT, and it was his generosity that created the Norman Dorsen

current members, the society's ranks have included George Washington, Thomas Jefferson, Charles Darwin and Albert Einstein. Among Dworkin's fellow inductees this year are Al Gore, *New Yorker* editor David Remnick, Martin Scorsese and Supreme Court Justice John Paul Stevens.

In its election essay for Dworkin, the society noted that Dworkin expanded the reach of moral philosophy "by essentially linking the interpretation of law with the perspective of morality, and by his unique position as a public intellectual. The position is unique in demonstrating in practice one of Dworkin's guiding ideas, namely that freedom of speech is fundamental to that responsibility for civic conversation apart from which society cannot know itself, that is, know what it values politically."

JOURNAL HONORS ESTLUND

Cynthia Estlund, Catherine A. Rein Professor of Law, won the Samuel M. Kaynard Award for Excellence in the Fields of Labor & Employment Law from the *Hofstra Labor & Employment Law Journal*. Editor-in-Chief Alexander Leonard said that Estlund's selection by the journal's executive board was unanimous, describing

by lawyers outside of labor and employment law. She perfectly fit the spirit of the Kaynard Award."

DISTINCTION FOR FOX

Eleanor Fox '61, Walter J. Derenberg Professor of Trade Regulation, received the 2007 Distinguished Service Award from the American Foreign Law Association (AFLA). The award has been given for more than a decade to those who have made significant contributions to either AFLA or the broader field of international business or comparative law. Roger Goebel '60, professor at Fordham University School of Law and chair of the AFLA's award committee, explained that the award "was given to Eleanor Fox in view of her outstanding expertise in U.S. and international competition law. Eleanor's specialization in anti-trust law commenced as the first woman partner of Simpson Thacher & Bartlett, and she continued to devote her principal academic attention to the field after she joined the NYU Law faculty. For over 30 years, she has provided the highest level of academic commentary, in particular on international and European Union competition law. For the last decade, she has particularly

devoted time and effort to assisting anti-trust authorities, judges and academics in developing countries as they try to create and implement competition law."

LAW ARTICLE WINS AWARD

The UCLA School of Law and its Williams Institute have bestowed the Dukeminier Award on Sylvia Law '68, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, for her article "Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality" (*Stanford Journal of Civil Rights & Civil Liberties*, 2007). The award recognizes the best law review articles on issues involving sexual orientation and gender identity. Law's article questioned whether local executive officials have the authority to grant marriage licenses to same-sex couples, based on the officials' understanding of their own state constitutions.

the indignity of caste discrimination, or are unfairly profiled in America's 'war on terror,' there are few who are more deserving of an Access to Justice Award," says Amardeep Singh, vice president of the organization. "SABANY is proud of Professor Narula's work to ensure that our most vulnerable have access to justice." Narula also received the 2008 Public Interest Individual Achievement Award from the North American South Asian Bar Association, which represents 25 regional South Asian bar associations in the U.S. and Canada.

In addition, the Thorolf Rafto Foundation for Human Rights awarded its 2007 Rafto Prize to the National Campaign on Dalit Human Rights (NCDHR) for its efforts to fight caste prejudice in India; Narula is a cofounder of the campaign. Rafto Foundation Chairman Arne Liljedahl L yngnård called the NCDHR's struggle

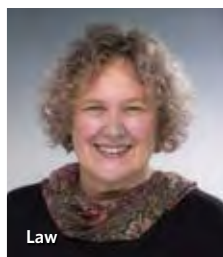
Following a clerkship with Supreme Court Justice John Paul Stevens, Bagley now is an attorney at the U.S. Department of Justice's civil appellate division.

STEVENSON WINS LAW PRIZE

Professor Bryan Stevenson, executive director of the Equal Justice Initiative, an organization that provides legal aid to indigent defendants and prisoners, has received the first annual Katharine and George Alexander Law Prize from Santa Clara University School of Law. The prize recognizes legal professionals who have done significant work to correct injustice and to promote human and civil rights, and includes a \$50,000 award. Selection criteria for the prize include the level of innovation and sustainability of the nominee's implemented programs; courage; self-sacrifice; the number of beneficiaries of the nominee's efforts, and other indications



Fox



Law



Merry



Narula



Revesz



Stevenson

MERRY'S BODY OF WORK LAUDED

Professor Sally Merry, who holds a joint appointment to the Law School's Institute for Law and Society and NYU's Department of Anthropology, was awarded the 2007 Harry J. Kalven, Jr. Prize by the Law and Society Association, a multinational, interdisciplinary group of scholars. The Kalven Prize recognizes "empirical scholarship that has contributed most effectively to the advancement of research in law and society." The Law and Society Association praised Merry's "substantial, original and consistently high quality [work]....While intellectually rigorous, her scholarship is also socially meaningful and policy-relevant. In addressing the question of human rights and violence against women in particular, Merry demonstrates that the best of scholarship need not abandon a commitment to social justice."

JUSTICE AWARD FOR NARULA

Smita Narula, associate professor of clinical law, received the 2007 Access to Justice Award from the South Asian Bar Association of New York (SABANY) for her work on behalf of South Asians. "Whether it's Professor Narula's work for those who suffer

"instrumental in mobilizing international human rights organizations to combat caste-based discrimination."

REVESZ ARTICLE SINGLED OUT

Dean Richard Revesz and Nicholas Bagley '05 were honored with the Award for Scholarship in Administrative Law from the American Bar Association's Section of Administrative Law and Regulatory Practice for their article, "Centralized Oversight of the Regulatory State," published in the *Columbia Law Review* in 2006. In the article, Revesz and Bagley examine the task of centralized review of agency rulemakings that is assigned to the Office of Management and Budget (OMB), and question the OMB's assumption that agencies have an inherent tendency to overregulate, which results in an antiregulatory bias on the part of the OMB. Daniel Troy, the award committee chair, said in the citation that "the article's analysis is sophisticated, subtle, open-minded, and careful, with an impressive mix of the theoretical and the practical," and that Revesz and Bagley "make a compelling case" and "provide a valuable guide for improvement." Revesz previously won the award in 1993.

of the nominee's commitment to international human rights and social justice. Dean Donald J. Polden called Stevenson "an outstanding lawyer who has made a great and positive difference in the lives of persons unjustly accused of crimes."

KOFLER BOOK WINS TAX AWARD

Acting Assistant Professor Georg Kofler was awarded the 2007 Mitchell B. Carroll Prize by the International Fiscal Association for his book, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht (Double Taxation Conventions and European Community Law)* explores the complicated relationship between bilateral tax treaties and supranational European law, touching on a wide range of issues such as tax treaty benefits for nonresidents; exemption of foreign losses; limits to exit taxation, and the legal status of tax treaties between European Union member states and between member states and non-European countries. Hugh J. Ault, professor at Boston College Law School and chair of the Mitchell B. Carroll Prize Jury, praised Kofler's work, saying it "will provide an important roadmap for those involved in the judicial and legislative developments in the field." □

New Faculty

John Ferejohn

VISITING PROFESSOR OF LAW

JOHN FEREJOHN CAN LECTURE ON PORK-barrel politics in the afternoon and whip up a dish of pork bellies with scallops that evening. A true Renaissance man who plays jazz saxophone, runs marathons, collects wines, travels extensively and experiments with molecular gastronomy—an avant-garde cuisine that uses chemical powders to create new textures such as liquid ravioli—Ferejohn has academic interests that also span a number of disciplines.

At Stanford University, his home since 1983, Ferejohn, Carolyn S. G. Munro Professor of Political Science, has chaired the department and taught in the philosophy department and the Graduate School of Business. Currently, he is a fellow at the Hoover Institution. A non-lawyer, he nonetheless has been teaching one semester at the NYU School of Law since 1993, and will join the faculty full-time in 2009. “He does everything,” says Lewis Kornhauser, Alfred B. Engelberg Professor of Law, with whom he coteaches the Colloquium on Law, Economics and Politics. “He has great curiosity, a penetrating mind, and can talk about anything that goes on in the Law School.”

Ferejohn is known for his work on voters and the responsiveness of their elected officials. He is also credited with being one of the founders of positive political thinking (PPT), a methodology that uses mathematical models, economics and game theory to analyze the workings of political institutions. “John is the great positive political theorist of his generation,” says Kenneth Shepsle, George D. Markham Professor of Government at Harvard University. “When he was starting out in the early 1970s, PPT was extremely novel. It was through a lot of John’s work that it became much more mainstream.”

Ferejohn was born on an Army base in Deming, New Mexico. His father, George, a high school dropout who once worked as a janitor at Columbia University, became a bombardier instructor in the U.S. Army Air Corps, then went on to attend Cornell University and Harvard Medical School.

He died tragically in his sleep at age 33 when Ferejohn was just seven years old. His mother, Olga Collazo, married physicist Robert Bjork and moved the family to Santa Monica.

At age 12, Ferejohn started playing the clarinet, saxophone and flute. Within a few years, he was playing at jazz clubs, intending to be a jazz musician. He married his high-school sweetheart, Sally, now a retired elementary school teacher, and worked his way through San Fernando State College doing payroll accounting for an aerospace company. Realizing soon enough that playing the sax wouldn’t pay the bills, he focused on his schoolwork and was accepted at Stanford University.

During his first year at Stanford in 1968, he “discovered that it was possible to use deductive thinking to see how politicians do things. I got interested in exploring the elegant and simple idea that complex political institutions had a simple underlying logic.” He loaded up on mathematics and economics courses, and in 1972, he earned his Ph.D. in political science. In 1974, he published his first of five books, *Pork Barrel Politics: Rivers and Harbors Legislation, 1947-1968* (Stanford University Press).

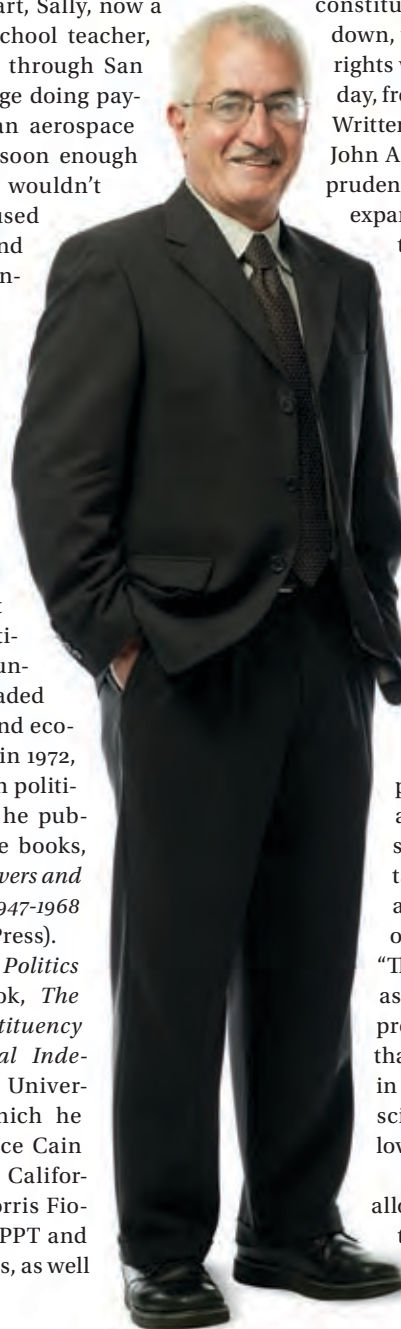
Both *Pork Barrel Politics* and his second book, *The Personal Vote: Constituency Service and Electoral Independence* (Harvard University Press, 1987), which he coauthored with Bruce Cain of the University of California, Berkeley and Morris Fiorina of Stanford, use PPT and game theory strategies, as well

as statistical modeling, to look at issues such as how politicians build support and, conversely, how constituents control politicians. “The logic of majority rule says don’t be too hard to please,” or you’ll be left out of the majority, Ferejohn says. “You better find a way to prevent politicians from playing you off against others. So essentially, to control a politician, you need to come to some sort of agreement with other voters on a single evaluative criterion, such as the liberal or conservative dimension, and then not set so high a standard that the politician will simply ignore it.”

Currently, he’s coauthoring a book tentatively called *Super Statutes*, which challenges the belief that the fundamental rights enjoyed by Americans are protected by the Constitution. “Instead of doing constitutional law from the top down, we want to look at the real rights we have and rely on day to day, from the bottom up,” he says. Written with William Eskridge Jr., John A. Garver Professor of Jurisprudence at Yale Law School, and expanded from an earlier article, the book is due to be published by Yale University Press in 2009.

Just as he improvises jazz compositions, Ferejohn enjoys taking an “eclectic” approach to academics. In addition to using techniques of PPT, he looks forward to collaborating with NYU legal philosophers Thomas Nagel and Liam Murphy, among others. “Part of law—constitutional law in particular—is really an applied area of political and moral philosophy. And NYU is really strong in these areas,” says Ferejohn, who has taught political philosophy at both California Institute of Technology and Stanford. “The nice thing about applied as opposed to theoretical approaches to these topics is that one can see the conflicts in sharper relief, and political scientists have a congenital love for conflict.”

Joining NYU full-time will allow him to focus more on the philosophical approach to law. Plus, Ferejohn,



who has three children and three grandchildren, will be able to explore Manhattan's exciting music scene—and its mouthwatering culinary offerings. He also looks forward to performing in some of the downtown jazz clubs he's played in the past. And who knows? He may even twist foie gras ribbons into bow ties in the kitchen of the city's molecular-cooking mecca, wd~50.

—Jennifer Frey

Moshe Halbertal

GRUSS PROFESSOR OF LAW

BURT NEUBORNE CALLS MOSHE HALBERTAL “the star of the Monday meetings.” At these weekly faculty gatherings, a professor presents a working paper; it's an opportunity to receive feedback and share expertise with fellow scholars. Halbertal always stands out for not only having read the week's paper but being among the first to ask questions. “He taught me how to behave on Mondays: I time my question carefully so that I have raised my hand early but get called on after Moshe,” says Neuborne, tongue-in-cheek. “Then I say, ‘Never mind, Moshe has already asked my question.’”

Halbertal, a global visiting professor of law and Gruss Visiting Professor of Law since 2003, joins the faculty as the tenured Gruss Professor of Law this fall. He will continue his practice of spending the spring semester in Israel, where he is a professor of Jewish thought and philosophy at Hebrew University. At NYU, he teaches Jewish Law and Legal Theory and the Ethics of Obligation in Jewish Law. Though he doesn't have a J.D., he has become, through his careful readings of others' work and long philosophical discussions, “indispensable to so many of us on the faculty,” says Amy Adler, who specializes in art law. Indeed, the news that Halbertal secured a permanent position on the faculty prompted an outpouring of unusually gushy praise, with colleagues calling him “beloved,” “a dear man,” and “joyful and soulful.”

Halbertal's extraordinary dedication and generosity may be the result of lessons learned from his father. Born in Montevideo, Uruguay, he grew up trilingual. His father, Meir, spoke Yiddish, his mother, Henya, was fluent in Hebrew, and both also spoke Spanish. A Jew born in Poland, Meir survived the Holocaust by fleeing to Russia. While much of his family perished, he spent time in a Siberian gulag and an orphanage, and escaped pogroms by joining distant relatives in Uruguay. There he met and married Henya, an elementary school

teacher. They had two sons, Moshe and Dov, and moved to Jerusalem when Moshe was eight years old. Halbertal remembers his father, the educational director of a high school who died in his early 70s in 2001, as an optimistic person who taught him the power of gratitude and giving. “When I asked him how he came from there without being broken,” says Halbertal, “he said, ‘Whenever I was in distress, I saw someone in far more distress and gave help to him.’” Both parents also instilled a deep respect for education. “My father's formative years were all about survival,” Halbertal says. “He wanted his children to have the gift of what he missed, the gift to study and grow, so in some ways, we were the children who fulfilled whatever he hadn't had.”

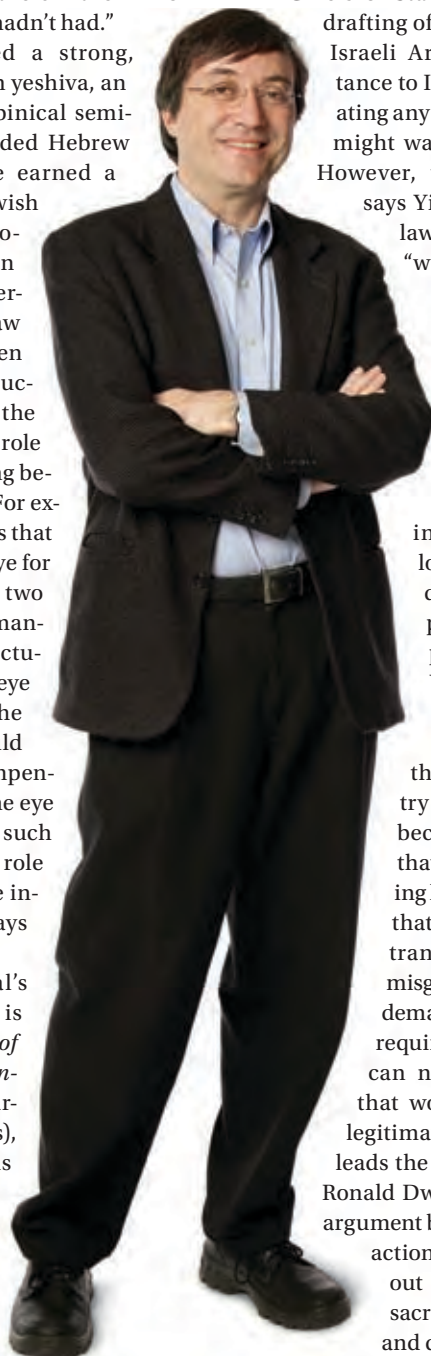
Halbertal received a strong, Talmudic education in yeshiva, an Orthodox Jewish rabbinical seminary, and then attended Hebrew University, where he earned a B.A. and a Ph.D. in Jewish thought and philosophy. His work began to focus on the intersection of Jewish law and philosophy when he noticed a “constructive tension,” namely the question, “What is the role of value in adjudicating between possibilities?” For example, Halbertal notes that a saying such as “an eye for an eye” can be read in two plausible ways: the semantic, where one would actually demand an actual eye in retribution, and the moral, where one would accept monetary compensation and consider the eye a metaphor. Through such analysis, “you see the role that values play in the interpretive process,” says Halbertal.

One of Halbertal's most notable works is the 1997 book *People of the Book: Canon, Meaning and Authority* (Harvard University Press), in which he applied his deep knowledge of religious thought to modern questions. “Part of Halbertal's gift is that he manages to reveal how

much the struggles within Jewish thought resonate with ongoing struggles in law, literature and politics today,” says Richard Pildes, Sudler Family Professor of Constitutional Law. Pildes cites current debates over the role of the Constitution in American law and culture, the proper methods of constitutional interpretation or the legitimate space for dissent from rulings of the Supreme Court as subject to illumination through Halbertal's exposure of the centuries-long turmoil over surprisingly similar issues within the traditions of Jewish religious thought.

In 2001, Halbertal was appointed by a committee established by the Israeli Joint Chiefs of Staff to contribute to the drafting of the ethics code for the Israeli Army. Given the importance to Israel of its military, creating any restrictions on military might was a delicate operation. However, the ultimate product, says Yishai Beer, professor of law at Hebrew University, “was a masterpiece.”

More recently, Halbertal was the guest at the Colloquium in Legal, Political and Social Philosophy—known for convening some of the most incisive, even ruthless, intellectuals and philosophers for a thorough dissection of papers-in-process. Halbertal's paper, “Self-Transcendence, Violence and the Political Order,” examines the suicide bomber and the terrorist who doesn't try to escape punishment because he wants to prove that the aim was worth risking his life. Halbertal claims that this kind of sacrificial transcendence is morally misguided. Legitimate moral demands may, in some cases, require sacrifice, but sacrifice can never legitimize action that would not otherwise be legitimate. Thomas Nagel, who leads the colloquium along with Ronald Dworkin, says Halbertal's argument boils down to, “If violent action is right, it's right without sacrifice. If it's wrong, sacrifice won't make it right” and described the paper as a



"lucid and original discussion of self-transcendence and its pathologies."

Living and teaching across an ocean and a continent can take its toll. But true to form, Halbertal, who is divorced and the father of three daughters, focuses on the positive. Living in two nations, he says, is "a gift" that confers the ability to be comfortable among different people and in different situations, and he is especially grateful to share that with his children. "We have a sense of the world not being a small place, which is a good thing," Halbertal says. "There is empowerment in exploring and seeing and contributing."

Robert Howse

**LLOYD C. NELSON PROFESSOR
OF INTERNATIONAL LAW**

ASKED WHO WAS MOST INFLUENTIAL IN shaping his illustrious academic career, Professor Robert Howse ran down a list of people before answering with a "thing"—the typewriter.

Howse had difficulty reading and writing until about age nine, when he learned how to form words on a typewriter based on the spatial organization of the keyboard. "All of a sudden there was this great sense of liberation," says Howse, who has since learned he is dyslexic. "The sense of empowerment from overcoming that kind of obstacle may have put me into overdrive."

An understatement indeed.

Soon Howse was a voracious reader, tackling serious literature. Though he still suffers from aspects of dyslexia—he can't drive a car—he now reads Plato in the original Greek (albeit slowly), writes extensively on 20th-century political philosophers Leo Strauss and Alexandre Kojève, is an expert in international trade law, and has shaped public policy in issues ranging from human rights to global warming. "He's a rare combination of somebody who knows international trade and investment law in detail, yet he's got a broad-ranging and creative intellectual outlook," says Richard Stewart, the John Edward Sexton Professor of Law.

Howse joined the faculty in June from the University of Michigan Law School, where he taught international law and legal and political philosophy. A full-time academic, he also has a high profile in public policy circles—he writes prolifically and has advised government agencies and international organizations, such as the Organisation for Economic Co-operation and Development, and the United Nations Office of the High Commissioner for Human Rights.

"Rob fully understands the policy and political context in which trade decisions are made, and this sets him apart from many academics in the international trade area," says Susan Esserman, chair of the international department at D.C.-based Steptoe & Johnson and a former deputy U.S. trade representative. "He has a great eye for emerging issues in the field, and he is endlessly creative," says Esserman, who has written with Howse for the Council on Foreign Relations' *Foreign Affairs* magazine and *The Financial Times*.

He's best known for cowriting *The Regulation of International Trade* (Routledge, 1995), a comprehensive look at the evolution of international trade theory and policy, which included analysis of the General Agreement on Tariffs and Trade and the World Trade Organization.

Currently, he's juggling a number of projects. Having been the principal trade expert for the Renewable Energy and International Law Project (a consortium with Baker & McKenzie and Yale University), he recently attended the first high-level policy meeting exclusively focused on climate change and trade, organized by the Danish Ministry of Foreign Affairs. He is collaborating with Ruti Teitel, Ernst C. Stiefel Professor of Comparative Law at New York Law School, on a series of projects that analyze the debate on globalization in relation to the human rights revolution in international law. He's writing a book tentatively called *Rehearing the Case of Leo Strauss*. In 2004, he self-published *Mozart: A Novel*, and he's currently writing another piece of fiction.

Raised non-religious by parents of Protestant origin, mainly in a predominantly Orthodox Jewish neighborhood of Toronto, he became fascinated with philosophy. "I had a sense of wonderment

about the different ways of leading our lives that came from this experience of otherness around me," he says.

In 11th grade, after being removed from his history class for misbehavior, he was put into an independent study. "I used this chance to study the themes that interested me, including the religious versus the secular life," he says. He came upon Strauss, one of many figures who influenced his career.

Howse entered the University of Toronto to study Straussian thought under the philosopher (and soon to be best-selling author) Allan Bloom. He graduated in 1980 with a B.A. in philosophy and political science. When Bloom left for the University of Chicago, Howse enrolled there, hoping to earn a master's degree. But Howse, who was politically left-leaning, left Chicago disillusioned after a few disagreements with Bloom and his neoconservative followers.

In 1982, he joined the Canadian diplomatic service. "[There] I developed a fascination for law as a discourse of diplomacy in international politics," says Howse. As a member of the Policy Planning Secretariat, Howse worked on then-Prime Minister Pierre Trudeau's global peace initiative. And as the Canadian Cultural attaché in Belgrade, he promoted Canadian rock-and-roll while also working on the former Yugoslavia's debt refinancing negotiations.

He returned to the University of Toronto, earning a law degree in 1989 and a master's from Harvard in 1990. Howse started teaching at the University of Toronto, where he stayed until joining the University of Michigan Law School in 1999.

He's had a long-standing relationship with NYU, which Howse is ready to formalize. As his research has moved increasingly in the direction of foundational



and conceptual questions in international law, “NYU has seemed the logical center,” he says, citing his interest in the history and theory of international law program. Moreover, his recent focus on climate change and trade is an excellent fit with the Global Administrative Law Project. On leave for the fall, he’ll teach international investment law and the history and theory of international law in the spring.

Howse is undergoing a divorce, and has no children. In keeping with his public policy positions, he leads a consciously responsible lifestyle—biking and walking whenever possible and buying organic. “I know from my research there are trade-offs,” he says, “but overall, I think that the result is greener than otherwise.”—J.F.

Mitchell Kane

PROFESSOR OF LAW

EVEN DUTIFUL STUDENTS TEND TO APPROACH introductory tax law like they would a bitter medicine: hoping to get done with the distasteful task as fast as possible. But when students of then-Visiting Professor Mitchell Kane’s class last fall swallowed their first dose, they asked for more, following him after class to a conference room where he held court on the tax ramifications of stock options.

Kane sees this general enthusiasm for the subject as natural. “This is a body of law that tells you who’s going to pay for what. That goes to the core of what a lot of people care about,” he says.

Previously in private practice specializing in international tax law, Kane joins the faculty this fall from the University of Virginia School of Law, where he has taught since 2003. “He’s one of the best junior tax scholars in the country, and clearly the best in international tax, leaving aside a handful of people who are considerably more senior,” says Daniel Shavero, Wayne Perry Professor of Taxation. “Mitchell is thus positioned to be an important leader in the field for decades to come, and I’m delighted that he’ll be here.”

Kane is best known for his 2004 piece, “Strategy and Cooperation in National Responses to International Tax Arbitrage,” published in the *Emory Law Journal*. International tax arbitrage refers to instances where taxpayers intentionally structure transactions to take advantage of variations in the tax laws across jurisdictions. The academic debate about such arbitrage had generally centered on the question of whether such tax planning activity is prob-

lematic. “My key contribution was to suggest that one could best understand arbitrage transactions not as planning opportunities for taxpayers, but rather as opportunities for governments, in their responses to the transactions, to behave strategically in the battle to attract global capital flows,” he says.

Recently, Kane has cultivated an interest in the role of tax policy in promoting capital flows to the developing world. In a working paper called “Bootstraps, Poverty Traps, and Poverty Pits: Tax Treaties as Novel Tools for Development Finance,” Kane proposes a financing technique that he says offers significant improvements over common sovereign debt arrangements. Typically, countries that attract foreign investors to build a plant or another business have the primary ability to tax any profits. These tax revenues are used to repay foreign creditors, as well as for other purposes. Rather than waiting for a payment from a country that might already be in debt, Kane proposes that developed nations negotiate treaties in which they transfer capital now in exchange for the primary right to tax income streams in the future. Critics contend “they’re trading back a piece of their sovereignty,” says Kane. But he argues, “It’s a sovereign decision to raise money more effectively. By world standards, our tax and compliance system is a pretty good machine.” So why not leave the taxing up to us?

Kane and his two siblings were raised in Norfolk, Virginia, by their parents Peter, 70, and Claudia, 64. An engineer by training, Peter now owns a family bar/restaurant; Claudia, who also owns a deli, was a food broker. A self-professed loner and nerd for most of his youth—in sixth grade he tackled Fyodor Dostoevsky’s *The Brothers Karamazov*—he came out of his shell in 11th grade when he joined the school’s golf team.



Kane entered Yale University interested in computer science, but soon became enamored with philosophy. By sophomore year, he was a philosophy major with a focus on the philosophy of law—having read Ronald Dworkin’s work—as well as the philosophy of criminal law.

Graduating from Yale in 1993, he enrolled in a joint degree program at the University of Virginia, earning his J.D. in 1996, and an M.A. in philosophy in 1997. That same year he started practice at the D.C. office of Covington & Burling, splitting his time between tax and litigation. Two weeks into his first litigation case, he was given boxes of documents to review. “After the first two boxes, I begged to be put full-time into the tax group,” he recalls, finding the mental gymnastics required to puzzle through the tax code far more compelling than “plowing through mounds of paper looking for a needle in a haystack.”

Out to lunch one day with his tax colleagues in 1999, he learned that his firm wanted to bring an associate to London. He raced back to his office to call his wife, Jessica. “We adored living abroad,” says Kane, whose practice morphed into international tax law during his three years in London.

In 2002, after Kane returned to the U.S., a mentor invited him to take a fellowship at the University of Virginia. He was offered a teaching position the following year. “I was 32 when I started, and the students didn’t look much younger than I did. It was incredibly intimidating,” recalls Kane, who spent two months preparing his first three lectures.

In addition to visiting in Fall 2007, Kane has attended NYU’s annual Colloquium on Tax Policy and Public Finance. “The energy of the place is incredible,” he says. “There’s something about NYU where I always feel like there’s 30 things going on that I want to be doing. That kind of richness of faculty dialogue is very appealing.”

Aside from working with his tax colleagues, he hopes to rekindle his interest in philosophy by attending and presenting the Colloquium in Legal, Political and Social Philosophy, run by Professors Dworkin, Liam Murphy and Thomas Nagel.

Having been a visiting professor at several universities in the past two years, including Harvard and Columbia, Kane is eager to settle down with Jessica and their children: Olivia, five, and Simon, two. Kane, who inherited recipes from his Alsatian mother, does the cooking at home. "I'm the master of the one-pot, stick-to-your-ribs, French country recipes," he says.—J.F.

Samuel Rascoff

ASSISTANT PROFESSOR OF LAW

SAMUEL RASCOFF IS PROBABLY THE ONLY badge-carrying member of the New York City Police Department to leave that gritty world for NYU Law. The director of the NYPD's 25-person intelligence analysis unit for the last two years, he had the heady responsibility of assessing the terrorist threat to the city, on call 24/7 whenever a threat emerged.

A dedicated public servant who previously worked for Ambassador Paul Bremer in setting up a transitional government in Iraq, Rascoff nonetheless sees joining NYU in June as a professor and faculty codirector at the Center on Law and Security as a logical move. "I firmly believe that shaping the American response to terrorism and creating a new architecture for counter-terrorism law is as much an act of public service as providing day-to-day assessments of terrorist threats," says Rascoff.

Rascoff's specialty is national security law, with an emphasis on counter-terrorism law—a burgeoning field that examines the sources, allocation and limits of government authority in protecting its citizens from terrorist attacks. While elements of national security law are relatively well-established in the law school curriculum, counter-terrorism law is still in its infancy. "We see ourselves as a leader in this new area of law. Having him join our faculty will be important as we move forward in that project," says Dean Richard Revesz, who first glimpsed Rascoff's scholarly abilities when the two collaborated on a law review article about risk regulation in the fall of 2001. "Even as a recent law school graduate, he had the ability, maturity and creativity of a seasoned academic."

One of three siblings, Rascoff was raised in New Rochelle by his dad, Joel, a retired

kidney specialist, and his mom, Barbara, a homemaker and perennial volunteer. An independent thinker, fluent in Arabic and Hebrew, he specialized in Islamic studies at Harvard. During college, he spent one summer working on the Pentagon's Middle East desk, another at the State Department. After graduating in 1996, he received a Marshall Scholarship to do a second bachelor's degree at Oxford University where he studied philosophy, politics and economics. Viewing the legal profession as "the priesthood of American public servants," he attended Yale Law, graduating in 2001.

Outgoing and charismatic, with flaming red hair and a flair for dramatic outfits, Rascoff always stood out, recalls college and law school buddy Professor Jedediah Purdy of Duke University. "He does orange and pink well, and can carry off a bow tie," he says.

In spring 2003, in between clerkships that included a year with Supreme Court Justice David H. Souter, Rascoff assisted Ambassador Bremer in Baghdad. Sleeping with 25 other people on cots covered with mosquito netting in the auxiliary kitchen of Saddam Hussein's Republican Palace, he spent his days meeting with Iraqi officials and crisscrossing the country, talking with everyday Iraqis. "Sam was one of a tiny number of advisors who spoke Arabic and understood the political context," says Professor Noah Feldman of Harvard Law, who was in Baghdad with him.

One day Feldman, Rascoff and a couple of other advisors drove without an escort into the Shiite areas south of Baghdad to talk to Iraqi citizens. "A couple of weeks later, Muhammad Baqir al-Hakim was killed by a car bomb in the same spot where we had just stood," recalls Feldman. Rascoff describes his time there succinctly: "I had a front row seat when consequential decisions were being made."

After Rascoff spent two years practicing litigation at Wachtell, Lipton, Rosen & Katz, NYPD Commissioner Raymond Kelly recruited him to set up the intelligence analysis unit. "We relied on Sam Rascoff's superb legal training, combined with his extraordinary knowledge and command of geopolitics, to create an intelligence analyst program that has earned worldwide acclaim," says Kelly. "He was personally responsible for recruiting top notch talent into the NYPD and did so with remarkable success." Much of what Rascoff did there remains confidential, but he is willing to say that his job ran the gamut, from monitoring cyberspace chat rooms to participating in operational activities.

Rascoff is currently working on an article entitled "National Security Federalism," in which he argues that state and local entities should play a larger role in setting national security policy, especially with regard to counter-terrorism. "National security so far has been relatively impervious to analysis through the lens of federalism," he says. "But with counter-terrorism figuring prominently in the security agenda, we've come to appreciate that local government agencies, such as police departments, will inevitably shoulder more responsibility in combating today's threats."

Those who know Rascoff predict he will make an easy adjustment to academia. "A lot of young associates are fairly invisible. That never happened with Sam. Everybody knew who he was," says Meyer Koplow, executive partner at Wachtell, Lipton, Rosen & Katz, adding, "He's going to make a great professor because he's just so approachable."

Rascoff and his wife Lauren, 29, a resident in obstetrics and gynecology, live in the city. They both frequent the opera, and occasionally Rascoff finds time to



play golf. Rascoff, a cantor in his synagogue, also attends daily services and enjoys having coffee afterward with two congregants, one in his 70s; the other in his 80s. "I always hit it off with the older set," he says.—J.F.

Kenji Yoshino

CHIEF JUSTICE EARL WARREN PROFESSOR OF CONSTITUTIONAL LAW

WHEN KENJI YOSHINO STARTED TEACHING at Yale Law School, he recalls a well-meaning colleague who offered him this advice: "You'll have an easier chance at getting tenure if you're a homosexual professional than if you're a professional homosexual." In other words, it was okay to be gay; just don't flaunt it.

That counsel, which Yoshino eventually rejected, helped inspire his award-winning work. *Covering: The Hidden Assault On Our Civil Rights* (Random House, 2006) is a memoir that blends his personal identity struggles as a gay, Japanese American with legal arguments in order to question whether assimilation is always beneficial. "We have a deep-seated belief as Americans that we all should melt into the pot," says Yoshino, a visiting professor for two years who joined NYU Law in July. "But if the demand for conformity is itself illegitimate, then assimilation is a symptom of discrimination rather than an escape from it."

In *Covering*, Yoshino discusses three stages of coming out: "conversion," "passing" and "covering." The latter two terms are adopted from the work of sociologist Erving Goffman. Conversion is the period in which a gay individual longs to become straight. Passing is the phase in which a gay individual has accepted his homosexuality, but hides it from society. And covering is a more subtle demand for assimilation, in which the individual is openly gay but feels pressured not to "flaunt." Covering is as much an assault on a gay individual's civil rights as the 1981 case in which an African-American woman was fired by American Airlines for wearing her hair in cornrows, Yoshino says. "His work gave us new categories for thinking about the types of discrimination that are relatively invisible to most people," says David Golove, Hiller Family Foundation Professor of Law. "He's had a major impact within constitutional and discrimination law." In fact, Supreme Court Justice John Paul Stevens used Yoshino's arguments, in part, to fashion a dissent from the Court's 2000 major ruling that the Boy Scouts of America

could exclude gays. Yoshino also coauthored a key amicus brief in *Lawrence v. Texas*, the 2003 case that struck down sodomy statutes across the country. "He is a superb lawyer who has reshaped anti-discrimination law by making us understand how forcing people to 'cover' diminishes their authenticity and personhood," says Yale Law School Dean Harold Hongju Koh.

Yoshino also discloses in his book his own identity struggles. As a first-generation American, Yoshino felt uncomfortable assimilating while growing up. His father, a professor at Harvard Business School, and his mother, a homemaker, raised Yoshino and his older sister in a suburb of Boston. Yoshino attended Phillips Exeter Academy, and he and his sister spent summers in Japan attending public school "to inhabit a Japanese body—to rise, to straighten, and to bow: to sit ramrod straight in my high collared uniform," he writes.

His parents would tell Yoshino and his sister to be "100 percent American in America, and 100 percent Japanese in Japan." He says his sister, who now lives in Tokyo, as do his parents, perfected these independent cultural identities in a way he never could. "I think in many ways my exposure to an extremely conformist culture in Japan fueled my understanding of assimilation long before I had any consciousness of being gay," Yoshino explains.

Until he was a young adult, he says he was stuck in the "conversion" stage. After graduating summa cum laude with a degree in English literature from Harvard in 1991, he earned a Master of Science in management studies at Oxford in 1993, on a Rhodes Scholarship. While at Oxford, though, he says, "I routinely went to the college chapel and prayed to the god I didn't believe in to be straight." At 22, he came out to his parents, but when he attended Yale Law, he continued to "pass" as straight to

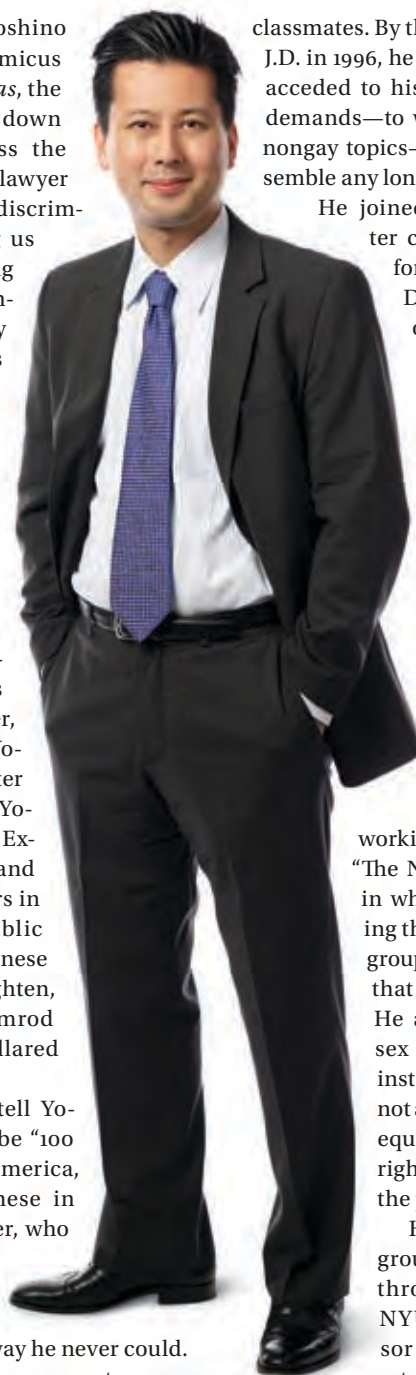
classmates. By the time he received his J.D. in 1996, he was openly gay, yet he acceded to his colleague's covering demands—to write about and teach nongay topics—until he couldn't dissemble any longer.

He joined the Yale faculty after clerking for judge and former Yale Law School Dean Guido Calabresi of the U.S. Court of Appeals for the Second Circuit. (He earned tenure at Yale in 2003 and became the inaugural Guido Calabresi Professor of Law in 2006.) Also a deputy dean for intellectual life, he coordinated the non-curricular academic life of the law school, such as scheduling workshops and student fellowships.

Currently, Yoshino is working on an article called "The New Equal Protection," in which he proposes shifting the legal paradigm from group-based equality to one that protects liberty for all. He argues that the same-sex marriage debate, for instance, should be framed not as the right of gays to be equal to straights but as the right of all people to marry the person they love.

His English lit background continues to shine through Yoshino's work. NYU University Professor Carol Gilligan, who cotaught a Shakespeare seminar with Yoshino, says: "You can't read [*Covering*] without being stunned by the sheer poetry of his writing." Drawing on his seminar with Gilligan, Yoshino is writing a book tentatively called *Shakespeare's Law*, in which he pairs five sets of Shakespeare's plays to show how the Bard argues both sides of fundamental questions of justice.

Yoshino, meanwhile, is eager to settle in at NYU. "It's important for people at some point to get away from their teachers, in the same way that you break from your parents," says Yoshino. "I came for the city, then I stayed for the school. I really fell in love with this institution."—J.F.



Revesz's Recruits: A Professorial Pop Quiz

BY JENNIFER FREY

1 Scott Turow based a character on this Emmy winner who had his own TV show and left Harvard Law for NYU after 35 years.

2 Who recently flew to Amsterdam to see Leonard Cohen in concert? Hint: Barack Obama used his textbook to teach his class at the University of Chicago.

3 What Argentinean turned her passion for virtual buying into research, and her passion for chocolate into what is destined to become a popular annual tasting for students?

4 He's shy (but loves teaching), is an expert in international tax arbitrage, and once slept right through his stop on an Italian train, waking up in Verona.

5 She avoids Chilean sea bass because it's endangered, read in French before English, and studied under Dean Revesz at Yale.

6 What Arabic- and Hebrew-speaking Marshall Scholar helped set up a transitional government in Iraq and ran an intelligence analysis unit of the NYPD?

7 This "walking encyclopedia" once grew a 1 1/2-pound tomato, studied chemical engineering, and switched to law after hearing Supreme Court Justice Antonin Scalia speak.

8 Who edited his college newspaper and considered pursuing a journalism career before becoming a legal historian?

9 Who once lived on a commune in Woodstock, NY, was on the *Harvard Crimson*, and worked as a reporter before earning her J.D. and a Ph.D. in economics?

10 What Guggenheim and NEH fellow ran a program at UC Berkeley modeled after NYU's law and philosophy colloquium, and is a witty roast master to boot?

11 Once a rebellious punker, this RTK scholar clerked at the International Court of Justice, speaks Kreyol and brought students to Yemen to investigate human rights abuses.

12 Who won funding to put his course online, dreamed of becoming a scientist in his teens, and got his J.D. when his peers were still toiling as mere undergrads?

13 Who earned four advanced degrees after his J.D., lawyered for the Israeli army, and publishes about three articles yearly?

14 What Rhodes Scholar (who came to NYU from Columbia Law) played goalie and became captain of the Yale Varsity lacrosse team, winning MVP twice?

15 Who was admitted to practice in New Zealand's Supreme Court, turned down two Oxford chairs and left Columbia Law for NYU Law?

16 Who sang opera wearing a black gown, a purple feather mask and stilettos last spring? Hint: This former Supreme Court clerk is an expert in labor law.

17 What Guggenheim Fellow helped found positive political thinking and worked his way through college as an accountant by day, and a sax player by night?

18 Who drafted an ethics code for the Israeli army, is an expert in Jewish philosophical thought and is equally comfortable in Israel and the United States?

19 Already a U Thant Scholar as a high schooler, she won a human rights award from India's Supreme Court for her tireless efforts to improve conditions for Dalits.

20 What Rhodes Scholar and language rights expert clerked for the Supreme Court, and auctioneered at the Public Service Auction? Hint: She also talks fast in class.

21 Whose award-winning book is required reading at two Southern universities, and was once referenced by Supreme Court Justice John Paul Stevens?

22 Who was a former clerk for conservatives Judge Laurence Silberman and Supreme Court Justice Antonin Scalia, and worked on John Kerry's and Barack Obama's presidential campaigns?

23 What international economic lawyer, novelist and former Canadian diplomat barged uninvited into University of Chicago seminars as a philosophy student, determined to hear Saul Bellow lecture?

24 Who banned laptops in her class, sings to her students, testified on the Hill, just quit playing softball at age 50 and came to NYU Law from its uptown rival?

25 What one-time biochemistry major has over 40 published articles and wrote the first casebook to include a hypothetical based on Martha Stewart's legal troubles?

26 Who broke up fights in a soup kitchen as a social worker, managed a state senator's reelection campaign and left a tax practice at Skadden, Arps for NYU?

27 Who ate in the White House kitchen during his childhood, and, before coming to NYU, had to find a new home for Reflector, his horse, as well as a brood of chickens?

NEW HIRES (2002-08)



Jennifer Arlen



Oren Bar-Gill



Rachel Barkow



Lily Batchelder



Stephen Choi



Kevin Davis



Cynthia Estlund



John Ferejohn



Moshe Halbertal



Roderick Hills Jr.



Robert Howse



Daniel Hulsebosch



Samuel Issacharoff



Mitchell Kane



Deborah Malamud



Florencia Marotta-Wurgler



Troy McKenzie



Arthur Miller



Smita Narula



Samuel Rascoff



Cristina Rodriguez



Margaret Satterthwaite



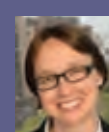
Samuel Scheffler



Catherine Sharkey



Jeremy Waldron



Katrina Wyman



Kenji Yoshino

- 1 Arthur Miller 2 Samuel Issacharoff 3 Florencia Marotta-Wurgler '01 4 Mitchell Kane 5 Katrina Wyman 6 Samuel Rascoff 7 Troy McKenzie '00
8 Daniel Hulsebosch 9 Jennifer Arlen '86 10 Samuel Scheffler 11 Margaret Satterthwaite '99 12 Kevin Davis 13 Oren Bar-Gill 14 Catherine Sharkey
15 Jeremy Waldron 16 Deborah Malamud 17 John Ferejohn 18 Moshe Halbertal 19 Smita Narula 20 Cristina Rodriguez 21 Kenji Yoshino
22 Rachel Barkow 23 Robert Howse 24 Cynthia Estlund 25 Stephen Choi 26 Lily Batchelder 27 Roderick Hills Jr.

Visiting Faculty

ALBERT ALSCHULER

Albert Alschuler will teach criminal law during his Spring 2009 visit from Northwestern University School of Law. He also plans to work on two articles. The first, "The Exclusionary Rule and Causation," concerns the uncovering of evidence through unlawful searches, while "The Miranda Disaster" concerns the failure of Miranda rights to halt police interrogation abuses and recommends that the courts revisit the underlying issues that gave rise to Miranda rights in the first place. Alschuler will also engage in a long-term project concerning two common fallacies in legal thought that lawyers should guard against, and which argues that both empirical and moral knowledge hinge on perceived patterns in sensory experience.



Alschuler will also engage in a long-term project concerning two common fallacies in legal thought that lawyers should guard against, and which argues that both empirical and moral knowledge hinge on perceived patterns in sensory experience.

The author of *Law Without Values: The Life, Work and Legacy of Justice Holmes* (2000) and the coauthor of *The Privilege Against Self-Incrimination: Its Origins and Development* (1997), Alschuler has published articles in journals including the *Columbia Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *Stanford Law Review* and the *Yale Law Journal*. He was the Julius Kreeger Professor of Law and Criminology at the University of Chicago, and has also taught at the University of Colorado Law School, the University of Pennsylvania Law School and the University of Texas School of Law.

Alschuler earned a J.D. from Harvard Law School, where he was case editor of the *Harvard Law Review*. He subsequently clerked for Justice Walter V. Schaefer of the Illinois Supreme Court, worked as special assistant to the assistant attorney general of the U.S. Department of Justice's Criminal Division, and was a Guggenheim Fellow. Alschuler has taught criminal law, criminal procedure, constitutional law, feminist legal theory and professional responsibility, among other subjects.

JOSÉ ALVAREZ

The Hamilton Fish Professor of International Law and Diplomacy as well as founder and executive director of the Center on Global Legal Problems at Columbia Law School, José Alvarez will teach Foreign Investment: Law and Policy and The United Nations and Other International Organizations while visiting NYU in Fall 2008.

The author of *International Organizations as Law-Makers* (2005), Alvarez has been published in journals including the *Columbia Law Review*, the *Duke Law Journal*, the *Michigan Law Review*, the *New York*



University Journal of International Law and Politics and the *Yale Journal of International Law*. Much of Alvarez's scholarship and teaching focuses on the post-World War II

turn to international institutions. He previously taught at the University of Michigan Law School, where he directed the Center for International and Comparative Law, and George Washington University Law School.

Alvarez earned a J.D. from Harvard Law School, where he was topics editor of the *Harvard International Law Journal*. He subsequently clerked for the late Judge Thomas Gibbs Gee of the U.S. Court of Appeals for the Fifth Circuit, and was an attorney at Shea & Gardner with an appellate litigation and administrative law practice before serving as an attorney adviser in the U.S. Department of State's Office of the Legal Adviser. Alvarez is currently president of the American Society of International Law, with which he has a longstanding involvement, and a member of the Council on Foreign Relations and the U.S. Department of State's Advisory Committee on Public International Law. He founded two public speaker series at Columbia Law School, one on public international law and the other on challenges in global governance, and has served on numerous boards and committees, including the advisory board of Columbia Law School's Human Rights Institute.

SARA SUN BEALE

Sara Sun Beale will teach Criminal Law when she visits NYU in Spring 2009 from Duke University, where she is the Charles L.B. Lowndes Professor of Law. Her scholarship encompasses the federal criminal justice system, federal procedural law, corporate criminal liability and the political and psychological forces influencing criminal justice policymaking.

Beale is the coauthor of *Federal Criminal Law and Its Enforcement* (2006, fourth edition), *Federal Criminal Law and Related Civil Actions: Forfeitures, the False Claim Act, and RICO* (1998) and *Grand Jury Law and Practice* (1997, second edition). She



has published articles in the *Columbia Law Review*, the *Duke Law Journal*, the *Fordham Law Review*, the *Michigan Law Review* and the *Texas Law Review*. Beale is the

reporter for the Judicial Conference Advisory Committee on Criminal Rules, and was also reporter for the Three Branch Working Group on the Principles to Govern the Federalization of Criminal Law, convened by then-Attorney General Janet Reno.

After earning her J.D. from the University of Michigan, Beale was an associate at Dykema, Gossett, Spencer, Goodnow & Trigg in Detroit. She subsequently clerked for Judge Wade H. McCree Jr. of the U.S. Court of Appeals for the Sixth Circuit, worked as an attorney adviser in the U.S. Department of Justice's Office of Legal Counsel and served as assistant to the Justice Department's solicitor general. Beale is past senior associate dean for academic affairs at Duke University School of Law.

BARTON BEEBE

A professor at Yeshiva University's Benjamin N. Cardozo School of Law, Barton Beebe will teach trademark law and the seminar Intellectual Property Law and Globalization during his Fall 2008 visit to NYU. He will also research copyright fair-use case law, write an essay on intellectual property law understood as a form of sumptuary law and study the concept of similarity in intellectual property law. Of the latter topic, Beebe says, "So much of intellectual property law turns on judges' assessments



globalization during his Fall 2008 visit to NYU. He will also research copyright fair-use case law, write an essay on intellectual property law understood as a form of sumptuary law and study the concept of similarity in intellectual property law. Of the latter topic, Beebe says, "So much of intellectual property law turns on judges' assessments

of the latter topic, Beebe says, "So much of intellectual property law turns on judges' assessments

of similarity—is the defendant’s trademark or copyrighted work unduly similar to the plaintiff’s?—but the doctrine itself offers very little guidance on how judges should go about making these assessments.”

Beebe has been published in the *California Law Review*, the *Michigan Law Review*, the *Pennsylvania Law Review*, the *UCLA Law Review* and the *Yale Law Journal*. He has a Ph.D. in English from Princeton University and a J.D. from Yale Law School, where he was senior editor of the *Yale Law Journal*. After law school, Beebe clerked for Judge Denise Cote of the U.S. District Court of the Southern District of New York. He was a special master in the trademark case *Louis Vuitton Malletier v. Dooney & Bourke, Inc.* (2006). Beebe has taught trademark law and copyright law in addition to intellectual property and globalization.

ADAM COX

Adam Cox, an assistant professor at the University of Chicago Law School, will teach Immigration Law and the Rights of Non-citizens in Fall 2008. He will also work on a number of projects, including an empirical paper about the transformation of voting rights litigation as well as papers on the organizing principles of immigration law, immigrant voting rights and the institutional design of immigration law, and the role of the president in immigration law.

Cox has been published in the *California Law Review*, the *Columbia Law Review*, the *New York University Law Review*, the *Stanford Law Review*, the *University of Chicago Law Review* and the *Virginia Law Review*. After earning a J.D. from the University of Michigan Law School, where he graduated first in his class and was articles editor of the *Michigan Law Review*, Cox clerked for Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. He was subsequently a Karparkin Civil Rights Fellow at the American Civil Liberties Union Foundation and an associate at Wilmer, Cutler & Pickering in New York.

MIHIR DESAI

Mihir Desai, professor at Harvard Business School, will research corporate taxation and governance, particularly the concept of recentering the corporate tax on public financial statements, while visiting NYU in Spring 2009. He will also be in residence in Fall 2008.

Desai is the author of *International Finance: A Casebook* (2006), and has published articles in the *Brookings Papers on Economic Activity*, the *Journal of Finance*, the *National Tax Journal*, the *Quarterly Journal of Economics* and the *Review of Financial Studies*, along with the *Financial Times*, the *Harvard Business Review* and the *Times of India*.

Desai is a research associate at the National Bureau of Economic Research, a nonprofit research organization, where he codirects the India Working Group. He was a financial analyst at CS First Boston.



He has testified before the U.S. Senate’s Committee on Homeland Security and Governmental Affairs, the U.S. House Committee on Ways and Means, and the President’s Advisory Panel on Federal Tax Reform on the issues of tax treatment of stock options, the corporate tax, and taxation and global competitiveness. In his House testimony, Desai pointed out problems with the corporate taxation reporting system.

“While individuals are not faced with this perplexing choice of how to characterize their income depending on the audience,” he said, “corporations do find themselves in this curious situation. Dual books for accounting and tax purposes are standard in corporate America and, judging from recent analysis, are the province of much creative decision-making.”

Desai received an M.B.A. and a Ph.D. in political economy from Harvard University, and was a Fulbright Scholar in India.

RISA GOLUBOFF

While visiting NYU in Fall 2008, Risa Goluboff, a professor of law and history at the University of Virginia, will teach Constitutional Law and work on scholarship pertaining to the Supreme Court, vagrancy law and social movements in the 1950s, ’60s and ’70s. In addition to constitutional law, she teaches civil rights litigation and legal history.



The coeditor of *Civil Rights Stories* (2008) and the author of *The Lost Promise of Civil Rights* (2007), Goluboff has published articles in the *Duke Law Journal*, the *UCLA Law Review*, the *University of Pennsylvania Law Review* and the *University of Toledo*

Law Review. She clerked for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, and for Justice Stephen Breyer of the U.S. Supreme Court.

Goluboff received a J.D. from Yale Law School, where she was senior editor of the *Yale Law Journal*, and earned both an M.A. and a Ph.D. in history from Princeton University. As a Fulbright Scholar, she lectured in sociology at the University of Cape Town in South Africa, and won the Amy Biehl Fulbright Award as the highest-ranked Fulbright Scholar in Africa. In a 2007 article in the *Virginia Journal*, Goluboff said, “Teaching law students about constitutional law and civil rights gives me an opportunity to shape their understanding not only of the law but also of the relationship between the law and larger political and social questions.”

KRISTIN HENNING

Kristin Henning is an associate professor and deputy director of the Juvenile Justice Clinic at Georgetown University Law Center. When she visits NYU in Spring 2009, she will coteach the Juvenile Defender Clinic with Professor Randy Hertz, and Civil Litigation with Professor Paula Galowitz.



Henning was previously the lead attorney of the Public Defender Service for the District of Columbia’s Juvenile Unit. She serves on the oversight and advisory committees of the D.C. Department of Youth Rehabilitation Services, as well as the boards and committees of several family and juvenile law organizations. She has published articles in the *California Law Review*, the *Nevada Law Journal*, the *New York University Law Review* and the *Notre Dame Law Review*.

The recipient of the 2008 Shanara Gilbert Award from the Association of American Law Schools’ Section on Clinical Legal Education, which honors emerging clinicians, Henning traveled to Liberia in 2006 and 2007 in coordination with the American Bar Association and the United Nations Children’s Fund on a juvenile justice reform mission. Henning earned a J.D. from Yale Law School and an LL.M. from Georgetown. “In my work, I have met many wonderful young people who make poor decisions in response to very challenging life circumstances,” says Henning. “Few—if any—of these children are hardened criminals who cannot be rehabilitated. I hope to make a difference in the lives of many of these youth.”

MICHAEL PINARD

A professor at the University of Maryland School of Law, Michael Pinard '94 will teach the Offender Reentry Clinic when he visits NYU during the 2008-09 academic year. He will also work on an article comparing the collateral consequences of criminal convictions and the reentry of formerly incarcerated individuals in the United States to the experience of former prisoners in England, Canada and South Africa. Another article-in-progress argues that judges should consider the effects of sentences on a defendant's family and community.

Pinard has published articles in the *Arizona Law Review*, the *Boston University Law Review*, the *Connecticut Law Review*, the *Nevada Law Journal* and the *New York University Review of Law & Social Change*. He is coeditor-in-chief of the *Clinical Law Review*

and president of the Clinical Legal Education Association. Pinard was a Robert M. Cover Clinical Teaching Fellow at Yale Law School, taught at St. John's University School of

Law, and worked as a staff attorney at the Office of the Appellate Defender and the Neighborhood Defender Service of Harlem, both in New York City.

Pinard serves on the executive committee of the Public Justice Center in Baltimore, the advisory committees of John Jay College of Criminal Justice's Prisoner Reentry Institute in New York City and the Maryland Reentry Partnership in Baltimore, and the board of directors of the Jobs Opportunities Task Force in Baltimore. He earned a J.D. from the NYU School of Law, and received the Shanara Gilbert Award for emerging clinicians in 2006 from the Association of American Law Schools' Section on Clinical Legal Education.

ERIC POSNER

Eric Posner, the Kirkland & Ellis Professor of Law at the University of Chicago, will teach Contracts during his Fall 2008 visit, and also work on a book concerning the legal ramifications of climate change, an empirical project on state judiciary quality in collaboration with Professor Stephen Choi, and a project on evolving constitutional law.

Posner is the author of *The Recurrent Illusion: Global Legalism and International Relations* (2009, forthcoming) and *Law and Social Norms* (2000); coauthor of *Climate Change Justice* (2009, forthcoming),

Terror in the Balance: Security, Liberty and the Courts (2007), *New Foundations of Cost-Benefit Analysis* (2006) and *The Limits of International Law* (2005); editor of *Social Norms, Non-legal Sanctions, and the Law* (2007) and *Chicago Lectures in Law and Economics* (2000), and coeditor of *Cost-Benefit Analysis: Legal, Philosophical, and Economic Perspectives* (2001). He has been published in the *Columbia Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *Stanford Law Review* and the *Yale Law Journal*. He also is the editor of the *Journal of Legal Studies*.

After earning a J.D. from Harvard Law School and an M.A. in philosophy from Yale University, Posner clerked for Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit. He subsequently served as an attorney adviser in the U.S. Department of Justice's Office of Legal Counsel and taught at the University of Pennsylvania Law School. Posner testified before the U.S. House of Representatives' Committee on the Judiciary concerning the Bankruptcy Reform Act of 1999.

R. ANTHONY REESE

R. Anthony Reese, the Arnold, White & Durkee Centennial Professor of Law at the University of Texas at Austin, will visit the NYU School of Law in Spring 2009 to teach Copyright Law.

Reese has published articles in the *Journal of World Intellectual Property*, the *Stanford Law Review* and the *Texas Law Review*, among other publications. He is the coauthor, with Paul Goldstein, of the new edition of *Copyright, Patent, Trademark and Related State Doctrines* (2008, sixth edition), and coauthor as well of the

casebook *Internet Commerce: The Emerging Legal Framework* (2006). He has recently joined Jane Ginsburg and Robert Gorman as coauthor of their casebook *Copyright* (2007, seventh edition).

Before law school, Reese taught English for the Yale-China Association in Tianjin and Hunan. He earned his J.D. from Stanford Law School and clerked for Judge Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit. He also worked as an

associate at Morrison & Foerster in San Francisco, and continues to serve as special counsel to the firm.

RICHARD SCHRAGGER

When he visits NYU in Fall 2008, Richard Schragger, the Class of 1948 Professor in Scholarly Research in Law at the University of Virginia School of Law, will teach Property and work on projects concerning federalism, urban economic development and the constitutional and economic status of cities—including a paper on municipal efforts to control, regulate and redistribute mobile capital.

Schragger has published articles in the *Harvard Law Review*, the *Journal of Law & Politics*, the *Michigan Law Review*, the *Virginia Law Review* and the *Yale Law Journal*. He was an associate at Miller, Cassidy, Larroca & Lewin in Washington, D.C. Schragger earned an M.A. in legal and political theory from University College London. After receiving a J.D. from Harvard Law School, where he was supervising editor of the *Harvard Law Review*, Schragger clerked for Chief Judge Dolores Sloviter of the U.S. Court of Appeals for the Third Circuit. His teaching interests include local government law, land use, urban law and policy, constitutional law and church and state.

CHRISTOPHER SERKIN

Christopher Serkin will teach a course on land use and coteach the Colloquium on the Law, Economics and Politics of Urban Affairs when he visits the NYU School of Law in Spring 2009 from Brooklyn Law School, where he is an associate professor. He also plans to work on a number of articles as part of a project concerning the constitutional protection of private property, including the question of why current uses of property receive stronger protections than potential future uses as well as the effect of those protections on the investment incentives of property owners.

Serkin has been published in the *Columbia Law Review*, the *Indiana Law Review*, the *Michigan Law Review*, the *Michigan State Law Review*, the *New York University Law Review* and the *Northwestern University*



Law Review. He worked as a litigation associate at Davis Polk & Wardwell in New York, and was subsequently an acting assistant professor in the NYU School of Law's Lawyering Program.

After receiving a J.D. magna cum laude from the University of Michigan Law School, where he was articles editor of the *Michigan Law Review*, Serkin clerked for Judge J. Garvan Murtha of the U.S. District Court for the District of Vermont, and Judge John M. Walker Jr. of the U.S. Court of Appeals for the Second Circuit. At Brooklyn Law School he has taught in the areas of property, land use, and trusts and estates.

HOWARD SHELANSKI

During his Spring 2009 visit to the NYU School of Law, Howard Shelanski, a professor and associate dean at the University of California, Berkeley, School of Law and an affiliated faculty member of Berkeley's Haas



School of Business, will teach antitrust law and a seminar on antitrust in high technology markets. Shelanski, who is codirector of the Berkeley Center for Law and Technol-

ogy, also plans to spend time working on a book concerning the current debate over how merger enforcement should proceed in industries that are characterized by rapid technological change, and an article on the relationship between antitrust enforcement and industrial regulation.

Shelanski is the coauthor of *Antitrust Law, Policy, and Procedure: Cases, Materials, Problems* (2008, sixth edition, forthcoming) and coeditor of *Antitrust and Regulation in the EU and US* (2008, forthcoming). He has also published articles in the *Berkeley Technology Law Journal*, the *California Law Review*, the *Columbia Law Review*, the *University of Chicago Law Review* and the *Yale Journal on Regulation*, among other publications.

Shelanski has served as chief economist at the Federal Communications Commission and senior economist on the President's Council of Economic Advisers. He was previously working as an associate with a telecommunications, antitrust and general litigation practice at Kellogg, Huber, Hansen, Todd & Evans in Washington, D.C. After receiving an M.A. and Ph.D. in economics and a J.D. from the University of California, Berkeley, Shelanski clerked for Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia

Circuit, Judge Louis H. Pollak of the U.S. District Court for the Eastern District of Pennsylvania, and Justice Antonin Scalia of the U.S. Supreme Court.

PHILIP WEISER

Philip Weiser '94 will teach Telecommunications Law and Policy as well as the Law and Innovation seminar when he visits in Fall 2008. At the University of Colorado Law School, Weiser is associate dean for research, and founder and executive director of Silicon Flatirons Center for Law, Technology, and Entrepreneurship, which focuses on technology policy issues



and technology law. He specializes in antitrust law, constitutional law, intellectual property, Internet law and telecommunications law. While at NYU, Weiser plans to work on a scholarly project tentatively titled "Ending the Reign of Lawlessness and Disorder at the FCC," examining alternative institutional strategies for telecommunications regulation in the Internet age. "The project will focus on the defects in the Federal Communications Commission's current management of its notice and comment rulemaking processes," says Weiser, "highlighting both how it undermines rule of law values and is ill suited to regulating an increasingly dynamic technological environment." He will also serve as interim director of NYU's Information Law Institute.

Weiser is the coauthor of *Telecommunications Law and Policy* (2006, second edition) and *Digital Crossroads: American Telecommunications Policy in the Internet Age* (2005). He has published articles in journals such as the *Columbia Law Review*, the *Fordham Law Review*, the *Michigan Law Review*, the *New York University Law Review* and the *Texas Law Review*.

He has been senior counsel to the assistant attorney general of the U.S. Department of Justice's Antitrust Division, and testified before the U.S. Senate Committee on Commerce, Science and Transportation; the Federal Trade Commission; and the U.S. House of Representatives Committee on Energy and Commerce. He also served as special master to the Colorado Public Utilities Commission.

Weiser received a J.D. from NYU Law, and subsequently clerked for U.S. Supreme Court justices Byron R. White and Ruth Bader Ginsburg.

Multi-year Returning Faculty

ALAN AUERBACH

Alan Auerbach is the Robert D. Burch Professor of Economics and Law at the University of California, Berkeley, where he directs the Burch Center for Tax Policy



and Public Finance. He will coteach the Tax Policy Colloquium with Professor Daniel Shaviro when he visits the NYU School of Law in Spring 2009, and also plans to

continue his research in corporate taxation, budget rules and their design, capital gains taxation and unfunded social security systems.

Auerbach is a research associate at the National Bureau of Economic Research, and was deputy chief of staff of the U.S. Joint Committee on Taxation. He has taught economics at Harvard University and at the University of Pennsylvania, where he chaired the economics department; he also chaired that department at Berkeley.

A former member of the U.S. Congressional Budget Office's Panel of Economic Advisors and the U.S. Joint Committee on Taxation's Blue Ribbon Advisory Panel on Dynamic Scoring, Auerbach currently serves on the International Tax Policy Forum's Board of Academic Advisors and the Advisory Committee of the U.S. Department of Commerce's Bureau of Economic Analysis. He was editor of the *Journal of Economic Perspectives* and now edits the *American Economic Journal: Economic Policy*, both publications of the American Economic Association, of which he has been vice president.

Auerbach has edited, coedited and coauthored numerous books, including *Institutional Foundations of Public Finance: Economic and Legal Perspectives* (2009, forthcoming), *Taxing Corporate Income in the 21st Century* (2007) and *Macroeconomics: An Integrated Approach* (1998, second edition). He has published articles in the *American Economic Review*, the *Brookings Papers on Economic Activity*, the *Harvard Business Review*, the *Harvard Law Review* and the *National Tax Journal*.

A Ph.D. graduate in economics from Harvard University, Auerbach has consulted for the Congressional Budget Office, the International Monetary Fund, the New Zealand Treasury, the Organisation for

Economic Co-operation and Development, the Ministry of Finance, the U.S. Treasury, the World Bank and other organizations.

SIR JOHN BAKER

A leading authority on the development of English legal institutions, Sir John Baker will teach a course on the legal history of England in Fall 2008. He is the Downing Professor of the Laws of England at Cambridge University.



In addition to his appointment as a Senior Golieb Fellow at the Law School, Sir John has also been a Hauser Global Law professor, a fellow of the British Academy and a fellow of St. Catharine's College, Cambridge University.

The author of more than 25 books and 100 articles, Sir John is the general editor of the *Oxford History of the Laws of England* and the *Cambridge Studies in English Legal History*. He has held positions at Yale and Harvard law schools, the Huntington Library, the University of Oxford and the European University Institute in Florence. He was knighted in June 2003 for his significant contributions to the study of English legal history. Sir John holds an LL.B. and Ph.D. from University College London, and an M.A. and LL.D. from Cambridge.

CHARLES CAMERON

Charles Cameron, a prize-winning scholar of American politics, returns to the NYU School of Law from Princeton University, where he is a professor of politics and public affairs. Cameron will visit the Law School during the 2008-09 academic year; in Spring 2009 he will teach Political Environment of the Law.

Cameron's research focuses on political institutions and policymaking, and his writing has appeared in journals of political science, economics and law. His recent work includes game theoretic models of bargaining on collegial courts and a formal theory of judicial federalism, as well as empirical analyses of the "macropolitics" of the U.S. Supreme Court; the effects of race and gender diversity on decision-making in the U.S. Courts of Appeals; and lower-court compliance with Supreme Court decisions.



He is also writing a book on the politics of Supreme Court nominations.

Before joining the Princeton faculty, Cameron served as director of the M.P.A. program at Columbia University's School of International and Public Affairs, where he was a tenured professor in the Department of Political Science. Cameron holds an M.P.A. and a Ph.D. from Princeton's Woodrow Wilson School of Public and International Affairs.

RICHARD EPSTEIN

Richard Epstein, who will make his fourth visit to campus in Fall 2008, 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 antitrust, communications, constitutional, criminal, health, labor and Roman law; contracts; jurisprudence; patents; property, and torts, to name a few subjects. He will teach Torts during his visit to the Law School.



Epstein is the Peter and Kirstin Bedford Senior Fellow at Stanford University's Hoover Institution on War, Revolution and Peace. A former editor of the *Journal of Law and Economics* and the *Journal of Legal Studies*, he now directs Chicago's John M. Olin Program in Law and Economics. Among his books are *Overdose: How Excessive Government Regulation Stifles Pharmaceutical Innovation* (2006), *How Progressives Rewrote the Constitution* (2006) and *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (2008). Epstein earned an LL.B. from Yale University.

DANIEL RUBINFELD

Daniel Rubinfeld, the Robert L. Bridges Professor of Law and Professor of Economics at the University of California, Berkeley, will return in Fall 2008 for his seventh visit to NYU. Rubinfeld will be teaching Quantitative Methods and Antitrust Law and Economics.

A leading law and economics scholar, Rubinfeld has written articles on antitrust and competition policy, law and economics, and the political economy of federalism. He has also cowritten two economics textbooks with M.I.T. professor Robert Pindyck, *Microeconomics* (2008, seventh edition)

and *Econometric Models and Economic Forecasts* (2000, fourth edition). Rubinfeld is a former deputy assistant attorney for the



Antitrust Division of the U.S. Department of Justice, a past president of the American Law and Economics Association, and a fellow of the American Academy of Arts and Sciences and the National Bureau of Economic Research. He has both an M.S. and a Ph.D. in economics from M.I.T.

PETER SCHUCK

During his Spring 2009 visit to NYU, Peter Schuck (LL.M. '66) will teach advanced torts and the seminar Groups, Diversity and Law. He will also conduct research on topics including student suspensions from the New York City school system and the law and politics of inefficiency.

The Simeon E. Baldwin Professor of Law and former deputy dean at Yale Law School, Schuck is the author, coauthor, editor or coeditor of numerous books, including *Understanding America: The Anatomy of an Exceptional Nation* (2008), *Targeting in Social Programs: Avoiding Bad Bets, Removing Bad Apples* (2006), *Meditations of a Militant Moderate: Cool Views on Hot Topics* (2006), *Foundations of Administrative Law* (2004, second edition), *Diversity in America: Keeping Government at a Safe Distance* (2003), *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998), *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (1991) and *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1987). He has published articles in journals including the *Columbia Law Review*, the *Fordham Law Review*, the *Michigan Law Review*, the *Stanford Law Review* and the *Yale Law Journal*.



Schuck earned a J.D. from Harvard Law School, an LL.M. from NYU and an M.A. in government from Harvard University, and has had Guggenheim and Fulbright fellowships. After practicing law privately in New York City, he served as director of Consumers Union's Washington office and as principal deputy assistant secretary for planning and evaluation in the U.S. Department of Health, Education, and Welfare.

Schuck earned a J.D. from Harvard Law School, an LL.M. from NYU and an M.A. in government from Harvard University, and has had Guggenheim and Fulbright fellowships. After practicing law privately in New York City, he served as director of Consumers Union's Washington office and as principal deputy assistant secretary for planning and evaluation in the U.S. Department of Health, Education, and Welfare.

GEOFFREY STONE

Geoffrey Stone, who will visit for the seventh time in Fall 2008, will teach First Amendment Rights of Expression and Association. Stone is the Edward H. Levi Distinguished



Service Professor at the University of Chicago Law School, where he earned his J.D. After clerking for Judge J. Skelly Wright of the U.S. Court of Appeals for the District of

Columbia Circuit and Justice William J. Brennan Jr. of the U.S. Supreme Court, he returned to his alma mater as a professor before serving as dean and then provost. A preeminent First Amendment scholar, Stone wrote about the effects of war on the First Amendment in *Perilous Times* (2004), which received the *Los Angeles Times* Book Award and the Robert F. Kennedy National Book Award. His most recent books are *War and Liberty* (2007) and *Top Secret* (2007).

Alexander Fellow

ALISON NATHAN

Alison Nathan's primary research project as a 2008-09 Alexander Fellow will explore the interest in "finality" as a key procedural value in American procedural law. She will also work on an article concerning "procedural, historical, sociological and structural factors that have led to a failure of the democratic deliberative process regarding the humaneness of lethal injection as it is pervasively practiced in a majority of death penalty states."

Nathan earned a B.A. in philosophy and women's studies from Cornell University, and graduated magna cum laude from



Cornell Law School, where she was editor-in-chief of the *Cornell Law Review* and a member of Order of the Coif. She clerked for Judge Betty Binns Fletcher of the U.S. Court of

Appeals for the Ninth Circuit, and for Justice John Paul Stevens of the U.S. Supreme Court. As an associate at Wilmer Cutler Pickering Hale and Dorr in Washington, D.C., she was a key member of the appellate and Supreme Court litigation groups, and represented death-row inmates in federal habeas corpus litigation in her pro bono practice. While on leave in 2004, Nathan worked as assistant national counsel to the Kerry-Edwards pres-

idential campaign, coordinating a national voter protection program and serving on the vice presidential selection vetting team.

Upon leaving private practice, Nathan was a visiting assistant professor at Fordham Law School, where she taught first-year civil procedure and a capital punishment seminar and served as faculty advisor to the Fordham Law Death Penalty Project. In that capacity, she authored an amicus brief that was cited in Chief Justice John Roberts's plurality opinion in the lethal injection case *Baze v. Rees*. Nathan recently coordinated primary voter protection programs in several states for Barack Obama's presidential campaign.

Judicial Fellow

JUDGE ALBERT ROSENBLATT

Judge Albert Rosenblatt will visit NYU as a Judicial Fellow in the 2008-09 academic year. He will be teaching the State Courts and Appellate Advocacy Seminar both semesters, and working with the Law School's Dwight D. Opperman Institute for Judicial Administration.

Now retired from the New York State Court of Appeals, Rosenblatt has had a dis-



tinguished career as a New York State Supreme Court justice; an associate justice of the New York State Supreme Court's Appellate Division, Second Department; chief

administrative judge of New York State courts; and both a county judge and district attorney in Dutchess County, New York. He was also a visiting judge at the Harvard Law School Trial Advocacy Workshop, a faculty member of the New York State Judicial Training Seminars, and a course presenter in the Newly Elected Judges Education Program in New York City.

Rosenblatt's books include *The Judges of the New York Court of Appeals: A Biographical History* (2007) and *New York's New Drug Laws and Sentencing Statutes* (1973). He has been published in the *Albany Law Review*, the *Cardozo Law Review*, the *New York Law Journal* and the *Washington University Law Quarterly*, and has served five times as an issue coeditor of the *New York State Bar Journal* with New York State Chief Judge Judith S. Kaye '62.

Looking back on the many cases he has judged over the years, Rosenblatt, a Harvard Law graduate, says, "The ones I most enjoyed writing up were those in which I

had to uncover the historical underpinnings, in some instances back to common law or other historical origins that helped explain things." These cases touched on issues as diverse as organ donation, worker safety, maternal rights, duty of innkeepers to guests and termination of life support.

Rosenblatt is currently counsel at McCabe & Mack in Poughkeepsie. He is also president and a charter trustee of the Historical Society of the Courts of the State of New York, as well as a fellow of the New York Bar Foundation. He has judged moot court competitions, served on various legal committees and received numerous awards.

Global Visiting Professors of Law

BINA AGARWAL

A professor at the University of Delhi's Institute of Economic Growth, Bina Agarwal has written eight books and numerous papers on subjects ranging from land and property rights to agriculture and technological change and the political economy of gender. Her research is steeped in interdisciplinary and intercountry explora-



tions. Agarwal has been vice president of the International Economic Association and president of the International Association for Feminist Economics, and currently

serves on the United Nations Economic and Social Council's Committee for Development Policy and the Indian Prime Minister's National Council for Land Reforms. She holds an honorary doctorate from the Institute of Social Studies at The Hague. This year she received the Padma Shri, one of the highest civilian honors conferred by the Indian government. She is now completing a book on environmental governance and gender.

EYAL BENVENISTI

Eyal Benvenisti is Anny and Paul Yanowicz Professor of Human Rights at Tel Aviv University Faculty of Law. Benvenisti's teaching and research specialties include constitutional law, international law, human rights and administrative law. He was previously director of the Cegla Center for Interdisciplinary Research at Tel Aviv University, Hersch Lauterpacht Professor of International Law at the Hebrew

University of Jerusalem Faculty of Law and director of the Minerva Center for Human Rights. A former law clerk to Justice M. Ben-Porat of the Supreme Court of Israel, Ben-



venisti received his legal training at the Hebrew University of Jerusalem and Yale Law School. He has been a visiting professor at leading law schools in the United States,

and a visiting fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. He has written or edited eight books, and published many articles in prominent journals.

SUJIT CHOUDHRY

Sujit Choudhry holds the Scholl Chair and is associate dean at the University of Toronto's Faculty of Law. His research and teaching are focused on constitutional theory and comparative constitutional law. Choudhry has published more than 50 arti-



cles, book chapters and reports, and is currently writing a book titled *Rethinking Comparative Constitutional Law*. The editor of *Constitutional Design for Divided Soci-*

eties: Integration or Accommodation (2008) and *The Migration of Constitutional Ideas* (2007) and coeditor of *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (2006), Choudhry is also the symposium editor of the *International Journal of Constitutional Law*. Extensively involved in public policy development, Choudhry has consulted for the United Nations Development Program, the World Bank Institute and the Royal Commission on the Future of Health Care in Canada, among other organizations and government entities.

DAVID DYZENHAUS

A professor of law and philosophy as well as associate dean of Faculty of Law graduate studies at the University of Toronto, David Dyzenhaus previously taught at Queen's University Faculty of Law. He is the author of *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998), *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (1997) and *Hard Cases in*

Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (1991); the editor of *Recrafting the Rule of Law:*



The Limits of Legal Order (1999) and *Law as Politics: Carl Schmitt's Critique of Liberalism* (1998), and a coeditor of *Law and Morality: Readings in Legal Philosophy* (2007,

third edition). Dyzenhaus has taught in South Africa, England and Canada, and is a fellow of the Royal Society of Canada.

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 president of the International Association for the Advancement of Teaching and Research in Intellectual Property, and has advised the American Law Institute's project Intellectual Property: Principles Governing Juris-



diction, Choice of Law, and Judgments in Transnational Disputes. Kur has lectured on trademark law, intellectual property law and private international law at Munich

University and the Munich Intellectual Property Law Center. 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.

YORAM MARGALIOH

Yoram Margalioth (LL.M. '95, J.S.D. '97), a professor of law at Tel Aviv University, teaches tax, tax policy, welfare and economic growth poli-



cies, and supervises the Micro-business and Economic Justice Clinical Program. His areas of research include optimal tax and transfer systems,

international taxation, tax and development, economic growth, social security and pension law, racial profiling, antidis-

crimination, affirmative action, antiterror, family taxation, fertility and childcare, environmental taxation, mandated benefits and labor economics. Margalioth holds an LL.B. from Hebrew University, and an LL.M. in taxation and a J.S.D. from NYU School of Law. He has clerked for Justice Shoshana Nethanyahu of the Supreme Court of Israel; has served as deputy director of Harvard University's International Tax Program, teaching Tax and Development; and has visited Northwestern University, teaching Tax Policy.

ZIBA MIR-HOSSEINI

Ziba Mir-Hosseini is an independent consultant, researcher and writer on Middle Eastern issues, specializing in gender, family relations, Islamic law and development. A senior research associate at the School of Oriental and African Studies' London Middle Eastern Institute at the Univer-



sity of London, she obtained her Ph.D. in social anthropology from the University of Cambridge. She has held numerous research fellowships and visiting professor-

ships. Mir-Hosseini's publications include the monographs *Marriage on Trial: A Study of Islamic Family Law in Iran and Morocco* (2001, revised edition), *Islam and Gender: The Religious Debate in Contemporary Iran* (1999), and (with Richard Tapper) *Islam and Democracy in Iran: Eshkevari and the Quest for Reform* (2006). She has also directed (with Kim Longinotto) two award-winning feature-length documentary films on contemporary issues in Iran: *Divorce Iranian Style* (1998) and *Runaway* (2001).

TUNDE OGOWEWO

A professor at King's College London, University of London, Tunde Ogowewo teaches



corporate finance law, corporate governance and mergers and acquisitions law, and is recognized as a leading expert on U.K. takeover law. Ogowewo has written three

books and numerous articles, has been coeditor of the *Journal of African Law*, and serves on the editorial boards of the *African Journal of International and Comparative Law* and the *Securities Market Journal*. He has been cited in numerous legal cases.

Ogowewo has consulted for the U.K. Prime Minister's Strategy Unit, the Presidency of Nigeria, the Queen's Proctor and the Commonwealth Secretariat. In 2003 he cochaired an international conference of legal experts in association with the U.S. Department of Commerce, leading to the adoption of the *Model Law on Investment in Africa*. Ogowewo belongs to the U.K.'s Chartered Institute of Arbitrators.

SHARON RABIN-MARGALIOTH

Sharon Rabin-Margalioth (LL.M. '96, J.S.D. '97), a top Israeli scholar in the areas of labor and employment law, teaches at the Interdisciplinary Center's Radzyner School of Law in Israel. In her scholarship, Rabin-Margalioth has examined a wide range of legal issues, including the decline of union-



ization, employment class actions, the growth of the contingent workforce and the implications of various antidiscrimination and accommodation mandates. Her

articles are frequently cited by the Israeli Supreme Court and the National Labor Court. Rabin-Margalioth, a former clerk to Justice Gabriel Bach of the Israeli Supreme Court, earned an LL.B. from Hebrew University, and an LL.M. and a J.S.D. from the NYU School of Law. She is the coeditor of *Labor, Society and Law*, a leading employment law journal in Israel.

WOLFGANG SCHÖN

Wolfgang Schön, managing director in the Max Planck Institute for Intellectual Property, Competition and Tax Law's Department of Accounting and Tax and a professor at Ludwig Maximilians University of Munich, is an expert in private law, trade and corporate law, accounting law and fiscal law. He is



chair of the German Law Professors' Working Group on Accounting Law as well as of the German Tax Law Association's Scientific Council; an international research fellow at the University of Oxford's Center for Business Taxation; a member of the French Institute for Tax Policy's Scientific Committee as well as the International Fiscal Association's Permanent Scientific Committee, and the managing editor of *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*,

the oldest German-language journal on commercial and corporate law. Schön has delivered the David R. Tillinghast Lecture on International Taxation at the NYU School of Law and has been the Anton Philips Professor at Tilburg University's Center for Company Law in the Netherlands.

ROGER VAN DEN BERGH

Roger Van den Bergh is the director of Erasmus University Rotterdam's Rotterdam Institute of Law and Economics (RILE).



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The Environment and Economics Aren't at Odds

RICHARD L. REVESZ

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AS THE PRESIDENTIAL RACE CONTINUES to unfold, John McCain and Barack Obama have explained their positions on a range of environmental issues from climate change to drilling in the Arctic National Wildlife Refuge, but they have said little about one of the most hotly contested questions in environmental policy.

Should cost-benefit analysis play a role when creating environmental standards?

In a case the Supreme Court is slated to hear just after the presidential election, *Entergy Corp. v. EPA*, the New Orleans-based utility company is challenging a 2007 federal appeals court decision that struck down a set of industry-friendly water regulations adopted by the Bush Administration. Power companies support these Clean Water Act rules because they do not require the installation of expensive “closed cycle cooling” systems that would reduce the killing each year of billions of fish and other aquatic wildlife. In federal court, environmental groups, along with six northeastern states, had successfully opposed the Environmental Protection Agency’s use of cost-benefit analysis to justify the new regulations.

It’s a familiar dance, one in which I took part back in 2001, when the Supreme Court considered similar questions in *Whitman v. American Trucking Associations*. In that case, I wrote the amicus brief for the Environmental Defense Fund and dozens of other environmental organizations, arguing that the Clean Air Act prohibited the agency from considering costs when setting key air quality standards.

As before, the challenge in the *Entergy* case will rest on arcane rules of statutory construction—what exactly does the Clean Water Act say, and what did Congress intend when it passed this law in 1972? It may well be that the Supreme Court decides in the environmentalists’ favor, as it did unanimously in 2001, that cost-benefit analysis cannot be used.

But no matter what the Supreme Court rules in this case, these groups will be on

the losing side in the larger battle for a cleaner environment if they don’t adopt a new strategy outside the courtroom.

History has proved that cost-benefit analysis is not going away, even if environmental groups manage to rack up a few legal victories here and there. In most cases, cost-benefit analysis is required by Executive Orders that have been in place since 1981, with only minor modifications, under both Democratic and Republican administrations. Further, with the country in the midst of an economic slowdown, environmental groups and policymakers will find it difficult, if not impossible, to muster public support for tough environmental standards if they can’t prove these policies make economic sense.

It’s easy to understand why most environmental groups and policymakers who care about the environment have opposed cost-benefit analysis. In researching our book, my co-author Michael Livermore and I spent three years studying how cost-benefit analysis has been used—and abused—in environmental law. We found that the methodologies used to count the costs and benefits of environmental policies have been largely shaped by anti-regulatory academics and interest groups representing industrial polluters and are thus systematically biased against good regulation.

The problem is that environmentalists have fought to end, rather than mend, cost-benefit analysis and in the process have lost valuable opportunities for reform.

During the Clinton years, I served on an Environmental Protection Agency advisory committee that was helping to write the rules for how cost-benefit analysis should be conducted. I saw first-hand how effective industry groups were at making their voices heard—and how environmental groups were absent from these discussions. Reluctant to be seen as endorsing cost-benefit analysis, they essentially boycotted the process and lost the ability to influence policy at a time when there was a sympathetic ear in the White House.

The result: methodologies for conducting cost-benefit analysis that are inconsistent with economic theory and empirical evidence—and inherently biased against regulation.

Even if the Supreme Court decides in environmentalists’ favor in the *Entergy* case, it’s clear that now is the time for environmentalists to drop their blanket rejection of cost-benefit analysis. Without cost-benefit analysis, we are essentially regulating in the dark, a bad idea when thousands of lives and billions of dollars might be at stake.

This summer, New York University School of Law is launching the Institute for the Study of Regulation to reform cost-benefit analysis and show that smart regulation is economically justified. By showing that even-handed economic analysis justifies strong environmental regulation—including controls on greenhouse gases—environmentalists can short-circuit industry attacks and build a broad political coalition that favors a strong regulatory agenda.

With a new administration taking office in January 2009, environmental groups will have an opportunity to participate in the federal policymaking apparatus. For too long, they have allowed cost-benefit analysis to be the tool of their enemy, and



over time that tool has taken on the shape of its master’s hand. They will face the daunting challenge of convincing the next president and Congress to take significant steps to reduce greenhouse gas emissions. To do so, they must show the American public that they are not zealots on a fool’s errand, but rather responsible voices working to address very real threats with real economic consequences.

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Local Redistribution and Judicial Intervention

Although municipalities, in theory, cannot effectively redistribute wealth, living wage ordinances are on the rise.

CLAYTON GILLETTE examines this theoretical and legal puzzle, and how and whether courts should get involved.



APPROXIMATELY 130 MUNICIPALITIES nationwide have adopted “living wage” ordinances that require cities that enact them, employers that do business with those cities, or particular employers located in those cities to pay low-wage workers higher hourly rates than would otherwise apply. These ordinances certainly have a positive effect on the income of low-wage workers. Their effect on employers and on the cities that adopt them is more

controversial. Some claim that the ordinances distort locational decisions of firms and retard the growth of employment, while others contend that the ordinances have had little or no adverse impact on employment in adopting cities. But perhaps even more puzzling is the fact that these ordinances are proposed at all. Insofar as they are enacted by municipalities, they contravene the conventional wisdom that localities should play little role in fulfilling the redistributive functions of government.

The basis of that orthodoxy, derived from standard theories of fiscal federalism and urban economics, is straightforward: Local governments cannot successfully or efficiently redistribute wealth. That conclusion is predicated on a simple and compelling premise. Residents and firms that bear the burden of local redistribution can too easily exit to neighboring jurisdictions that impose only benefit-based taxes of the sort that underwrite goods and services for taxpayers themselves. Residents who move to escape redistributive taxes impose a greater redistributive burden on those who remain, inducing them to follow suit in a continuing downward spiral. Redistributive exactions, the theory goes, should be the exclusive domain of more centralized jurisdictions—state and federal governments—from which taxpayers cannot easily exit without simultaneously giving up jobs, friends or lifestyle. Orthodox theory predicts that localities that defy this logic will lose the interjurisdictional competition for residents and tax base.

Although redistributive programs may assist either the relatively wealthy or the relatively poor, opponents of local redistribution tend to focus on the latter. Local redistribution to the wealthy receives a more mixed response, at least when it takes the form of business subsidies or tax expenditures (as opposed to openly regressive forms of taxation or the disproportionate delivery of municipal services to the wealthy). These subsidies are typically justified as inducements for local economic development that will redound to the benefit of all residents. Numerous studies either contest these claims, or contend that benefits garnered by the attracting locality will be more than offset by losses to other localities from which firms emigrate.

Standard theories of fiscal federalism are even less receptive to local redistribution for the poor, such as living-wage ordinances. Again, the underlying theory is that local residents and firms can too easily escape redistributive burdens by emigrating to localities that impose only benefit taxes. Emigrants are likely to be the relatively wealthy, who bear a disproportionate share of the redistributive burden and thus have incentives to find alternative residence. As they exit, the redistributive burden falls increasingly on those who remain, heightening incentives for them to emigrate as well.

Nevertheless, contrary to both intuition and the orthodox theory of fiscal federalism, there are many instances of local redistribution. On reflection, this phenomenon can be explained in a manner consistent

with the principle that decentralized government maximizes preference satisfaction by permitting like-minded individuals to congregate in jurisdictions that offer a bundle of goods and services that a more centralized jurisdiction might reject. That principle may have particular force where, as in the case of redistribution, the central government provides a baseline level of the good, but some individuals desire to fund services in excess of that baseline. Thus, if residents of one locality desire to have and pay for a higher level of redistributive services than other localities, there seems to be little basis for objection.

Most benign explanations for local redistribution to the poor apply this basic conception of heterogeneous preferences to allow individuals to sort themselves into decentralized jurisdictions by preferences for redistribution, just as individuals sort themselves for the delivery of other local public goods. But the strongest claim for local redistribution does not rely on altruism. Instead, self-interest may motivate local residents to support redistribution to the local poor, at least where those programs can be justified in the same terms that support local redistribution on behalf of the relatively wealthy. Local economic growth may be correlated with socioeconomic diversity. If attracting a diverse population would provide an advantage in interjurisdictional competition for residents and firms, then localities should be willing to make redistributive expenditures necessary to attract a socioeconomically diverse population.

The argument that socioeconomic diversity increases municipal economic welfare flows from speculation that the value of human capital increases with the diversity of the population; thus, a locality that attracts a socioeconomically heterogeneous population is likely to be more productive than one that is homogeneous. In a summary of theoretical and empirical studies on this issue, John Quigley attributes the relationship between diversity and local economic growth to five effects generated by socioeconomic heterogeneity. First, different groups have different knowledge and knowledge spillovers may permit greater growth by increasing the variety of options that firms can deploy to increase productivity.

Second, local economies thrive on the capacity to realize economies of scale by supporting amenities that are susceptible to multiple uses. Third, heterogeneity increases productivity by permitting more varied outputs for similar inputs. As the different uses for the same inputs expand, unit costs of obtaining them within the

local area decrease. Next Quigley suggests that diverse localities may be more productive because the large labor pool they can theoretically attract reduces the costs of matching labor and skills.

Finally, diverse localities may be better able to achieve stability notwithstanding fluctuations in the economy because some firms and consumers may be thriving when others are not. Reductions in variability are likely to be correlated with the diversity of economic activity, which itself depends on diversity of the population.

These productive effects are possible, however, only where the locality is able to attract residents who promote diversified use of public resources or who provide the labor and consumption that allows realization of the benefits of diversity. Thus, a locality may attempt to attract low-wage individuals who at first will need assistance in assimilating into the local environment. The desirability of a low-income population explains why cities that face declining populations have initiated programs to attract immigrants who can reduce labor shortages and forestall the degradation of housing.

This optimistic story of benign redistribution threatens to collapse, however, once we reintroduce the premises of the more conventional theory of local redistribution. If potential subsidizers can obtain many of the benefits of local redistribution while migrating just outside the redistributive jurisdiction, then why would any but the most altruistic remain? Hence, the risk of free riding may dampen implementation even of locally beneficial redistributive programs.

Benign explanations for successful local redistribution, therefore, still require a mechanism by which cities can either restrain residents from exiting or attract new residents who obtain sufficient benefits from city residence to offset their personal redistributive burden. Cities will be better able to implement benign redistribution, that is, if they can exploit some form of situational monopoly that discourages residents from departing and encourages potential new subsidizing residents to immigrate, notwithstanding redistributive taxes.

This monopoly may take the form of agglomeration economies—benefits realized by proximity to other firms within the industry or related to the industry—that cannot readily be duplicated in other jurisdictions. Geographical benefits, such as proximity to a river or a necessary source material, obviously are not easily substitutable. But interaction among firms within an industry or related industries may be equally effective in retaining firms

clustered within a small geographic area. Firms benefit from locating near professionals with whom they consult, such as their lawyers, bankers, and accountants, and near other firms in the same business so that they can exchange ideas about issues of common interest.

These agglomeration economies constrain the locational decisions of firms. There is at least some evidence that agglomeration benefits dissipate rapidly beyond short geographical distances. Thus, those who wish to take advantage of these benefits cannot readily migrate far from the cluster that generates them; instead, they must stay in a relatively concentrated geographic area, and it is unlikely that suburban areas will be able to accommodate all related firms that wish to take advantage of these economies. Moreover, given the benefits that networks of firms provide to their members, once a cluster has formed, no individual member has an incentive to depart except in the unlikely event of a simultaneous movement by large numbers of other network participants.

But the same situational monopoly that permits a locality to impose redistributive exactions for benign reasons without fear that dissenters and free riders will exit also reduces the ameliorative effects against undesirable redistribution that exiting provides. Just as firms cannot obtain agglomeration benefits without paying benign local redistributive taxes, so immobile residents are unable to avoid redistributive taxes imposed for objectives that serve much narrower interests. A firm that enjoys higher productivity because of its proximity to networks of competitors, suppliers and customers is unlikely to exit, even if it believes that its tax payments are applied to malign objectives, as long as the costs of being exploited are less than the agglomeration benefits the firm receives.

In an ideal world, we would retain benign local redistribution and invalidate its malign forms. But the various rationales for local redistribution, combined with the conundrum in which the same phenomena explain the availability of both malign and benign distributive programs, reveal the difficulty in classifying any given proposal as either an effort to enhance local welfare or as a sop to narrower political interests. Is the proposed living-wage ordinance a signal of an enlightened community's sympathy for low-wage workers? Or is it a concerted effort by local unions to increase wages for more skilled workers or to enhance their ranks in ways that may ultimately reduce local employment?

One might conclude that resolution of these difficult issues necessarily lies outside the domain of legal doctrine. On reflection, however, neither the ballot box nor the market for residence is likely to provide sufficient controls on malign redistribution. Individual projects that confer benefits on a small group are unlikely to be sufficiently salient to the uninterested majority to generate a negative reaction at the polls. After all, if the majority were, in fact, sufficiently agitated about a project, one might think that some entrepreneur would have been able to organize the opposition into a viable political force to prevent its passage. This means that projects that do not enjoy popular support can proceed nonetheless, not that the redistributive projects are an accurate expression of local will that warrants deference from other political institutions. Moreover, no single project—even one of little benefit to the locality as a whole—is likely to affect the local economy sufficiently to be the focal point of voter revolt against incumbents who are otherwise perceived as performing adequately. The market for residence, in turn, will be distorted by the same agglomeration economies that induce firms to remain within a particular jurisdiction, notwithstanding that each firm would prefer that all those within its network migrate to some alternative jurisdiction.

Courts that invalidate legislation they perceive as serving rent-seeking groups may be seen as acting consistently with admonitions by scholars that courts should resolve statutory ambiguities against interest groups. But these scholars have focused primarily on judicial interpretation of federal Congressional statutes. The state relationship between courts and legislatures may be different. This point is buttressed by the presence in many state constitutions of provisions that have no federal constitutional analogue and that are best explained as reflecting a concern about the redistributive tendencies that will emerge from unchecked state and local legislatures. The common theme among state constitutional provisions such as public-purpose requirements, limitations on credit, prohibitions on special legislation, gubernatorial line-item vetoes, prohibitions on unfunded mandates, and single-subject requirements is that they all constrain the capacity of state and local legislatures to enact rent-seeking laws. Their history reveals that they were frequently enacted in response to, and as safeguards against, legislative grants of governmental largesse that were perceived as serving narrow interests.

Even if state courts possess the constitutional authority to safeguard the political processes of local government against exploitation by interest groups, judicial capacity to fulfill this objective is by no means self-evident. Perhaps, however, courts could identify particular characteristics that systematically correlate with malign local redistributive programs. To the extent courts can do so, they would have a basis for using those characteristics to construe the scope of local authority to enact the program. It is, therefore, worth investigating some plausible proxies for redistributive legislation that fails to satisfy local preferences and thus is susceptible to judicial intervention.

We might, for instance, presume that successful rent-seeking is present when the redistribution that is being challenged favors the relatively wealthy, but that the opposite conclusion should obtain where redistribution favors the relatively poor. On the demand side, interest groups that favor the relatively wealthy may better be able to bear the costs of organization and lobbying necessary to procure favorable legislation. On the supply side, legislators may be more desirous of currying support from groups that can provide funds necessary to support political campaigns. It might be appropriate, therefore, to begin by asking who benefits from the proposed subsidy.

This simple dichotomy of the politically powerful wealthy and the politically disenfranchised poor, however, fails. Redistribution to the wealthy does not tend to signify a political process failure, and redistribution to the poor does not necessarily signify a working political market. Even when benefits are concentrated and costs are diffuse, redistribution to the wealthy may have positive effects that would be impeded by judicial invalidation based on the economic status of the immediate beneficiaries. Similarly, the interests of the poor may be better represented than a simple identification of the poor with diffuse, disorganized groups would suggest. First, even if the relatively poor constitute a small percentage of the voting electorate, they may still compose an effective voting bloc if they commonly vote their economic interests. Second, even if the poor cannot readily coalesce, they may have surrogates within relatively powerful groups and whose interests coincide with those of the poor.

While we cannot presumptively equate redistribution to the wealthy with malign expenditures or redistribution to the poor with benign, the transparency or salience of the redistributive payment may provide

a more robust explanatory tool. The intuition here, consistent with the literature on fiscal illusion, is that legislators who implement a redistributive program from publicly interested motives expect that most subsidizers would acquiesce. Thus, legislators should tend to make the costs of the program transparent to signal fidelity to constituents' preferences. Conversely, local legislatures that deviate from constituents' interests will raise constituents' monitoring costs by obfuscating the expenditures.

Nevertheless, there is reason to be cautious about equating on-budget expenditures with benign redistribution and off-budget expenditures with malign redistribution. Those equations rest precariously on the assumption that legislators balance the costs and benefits of on-budget expenditures but not of off-budget expenditures. Officials who appropriate municipal funds are spending the public's money, not their own. There is little reason to believe that officials who spend the public's money have incentives to internalize the costs of their activities in the manner that residual owners decide how to invest the funds of their own firm. The constraint of maintaining broad-based political support by operating an efficient budget can be offset by the desire to maintain political support of particular groups by allocating funds in a manner consistent with their more limited interests.

Alternatively, group size may be thought to correlate with benign or malign legislation. If burdens are imposed on a small group, there may be a presumption that those bearing the costs were unable to create or join a majority coalition that could avoid exploitation.

But here, too, the issue is more complicated than first impressions suggest. The group that bears redistributive costs may be too small to have significant political effect. For instance, an amendment to the living-wage ordinance in Berkeley, California, extended coverage to employers of a certain size or that are located in certain areas of the city. The recent Chicago living-wage ordinance applied only to retailers that occupy more than 90,000 square feet and make more than \$1 billion in annual gross revenue. But small size may also facilitate the kind of communication and organization that underlies successful political action. Members of the burdened group have incentives to identify and oppose the proposal, to emphasize competing priorities and to serve as surrogates for others adversely affected by the proposal but who have neither the information nor the



"See, Jimmy? If they give a big tax cut to the wealthy, those guys'll feel good and have us come fix their roof and stuff."

incentive to defend those interests. Under these circumstances, there is little reason to believe that decision makers will be left unaware of opportunity costs.

Local legislators may also avoid rigorous examination of costs and benefits, and thus be more likely to enact malign legislation, where redistributive costs are imposed on nonresidents. The inability of nonresidents to influence local decisions that have significant external effects is frequently the basis of claims that such decisions should be made at more centralized levels of government. For that same reason, the scope of local autonomy, even for home rule jurisdictions, is typically constrained to an area designated "municipal affairs."

But it would be a mistake for courts to identify externalized costs with malign redistribution. There may be legitimate reasons to impose exactions in the form of taxes or fees on nonresidents. The tourists and commuters on whom these exactions typically fall, after all, consume municipal services such as police and fire protection, but do not help defray their costs through the standard system of local property taxes. Thus, to the extent that the exactions reflect the pro rata costs of the municipal services that tourists and commuters consume, the fact that those costs disproportionately affect nonresidents does not

appear to reflect an effort to exploit those without political voice.

Even if courts could identify proxies for malign local redistribution, it is unclear that courts should act on that recognition. Narrow judicial interpretation of the scope of local autonomy to invalidate malign local redistributive programs does not necessarily foreclose malign redistribution. Local redistributive programs constitute part of a much larger redistributive puzzle. When seen from a broader perspective, that puzzle may satisfy overall social preferences for redistribution, even though individual pieces are inconsistent with those preferences. Imagine, for instance, a community that consists of the very wealthy and the very poor, the budget of which includes redistributive allocations in the form of subsidies for an opera that is frequented primarily by the rich, support for a municipal golf course also frequented primarily by the rich, subsidy of a municipal homeless shelter, and grants to small businesses in low-income areas. This combination may represent an implicit bargain within the community about how to spend redistributive dollars in order to ensure that different groups (here, the rich and the poor) receive pro rata shares of the budget. Invalidating expenditures on municipal funding of the golf course on the grounds that the

proposed expenditure fails to serve a "public purpose" could overturn the compromise among municipal residents about proper expenditures from the municipal budget.

The story of local redistribution and its relationship to judicial competence is complex. But it is worth understanding the sources of this complexity, since they reveal something about the proper role of a variety of actors in implementing government's redistributive role. The proper functions of cities, courts and even private interest groups are implicated in the lessons that emerge from living-wage ordinances and similar redistributive programs. The inherent difficulty of distinguishing between malign and benign redistribution makes it difficult to emerge from this analysis without some level of agnosticism or frustration. Concerns about the effects of judicial intervention may lead one to a more restrictive view about invalidating local redistributive programs. If I am correct that institutional constraints prevent courts from considering the global effects of invalidation, however, then selective intervention may actually increase the amount of malign legislation by moving decision making about local activity to a forum (the state) more susceptible to capture by dominant interest groups, or may perversely alter the mix of benign and malign legislation in ways that disfavor local redistribution to the poor in favor of local redistribution to the rich. Ultimately, perhaps even a desire to provide some safeguard against distortions of the political process must yield to the possibility that cures by constrained institutions could only exacerbate the disease. □

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A Presumption Against Preemption

Sidestepping the debate over whether state law is efficient, **RODERICK HILLS JR.** analyzes the politics behind key preemption rulings and argues that the courts should remove themselves from the preemption business—for the national good.



THE MOST BURNING ISSUE OF federalism today is preemption. State legislatures are making policy on issues ranging from predatory lending to greenhouse gases. These are often issues on which Congress cannot enact legislation because of the pervasive gridlock that afflicts the federal legislative process. Should courts presume that existing federal legislation preempts these new state initiatives, or should they presume that federal statutes leave room for states to try their hand at policymaking?

Given the open-ended language of most federal laws, either option is usually available. For a typical example of such statutory ambiguity, consider the Court's recent decision in *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007). Michigan (along with several other states) had enacted statutes prohibiting "predatory loans"—loans with excessive fees, penalties on refinancing, kickbacks to brokers for inflating interest rates, unnecessary insurance, or other signs of abuse of consumer ignorance. In response, the Office of the Comptroller of the Currency (OCC) issued

a rule stating that such state policies could not be enforced against the subsidiaries of nationally chartered banks, because, under the National Bank Act, such banks were governed exclusively by OCC's own much more lenient policy on predatory lending. The Watters Court held that the OCC had exclusive power to regulate the lending practices of national banks' subsidiaries, largely on the strength of the argument that state regulation would significantly impair national banks' powers to use subsidiaries. As the "bipartisan" dissent written by Justice Stevens (joined by Justice Scalia and Chief Justice Roberts) observed, the Court's holding was a perplexing inference from congressional silence: The National Banking Act provided that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law," implying that state-chartered subsidiaries of national banks ought to be subject to state law. In short, the issue of preemption in Watters was up for grabs as a purely textual matter. This is the usual state of affairs; the Court repeatedly deals with this sort of ambiguity about preemption virtually every term.

Most scholars and courts tend to think about this choice between state power and federal preemption as posing a conflict between the virtues of state diversity and federal uniformity. But this way of thinking about preemption overlooks one of the most important characteristics of state laws: Such laws tend to inspire Congress to address important but controversial issues that Congress would prefer to ignore. Industries burdened by state regulation frequently seek federal legislation to preempt the offending state laws. Their lobbying to be free from state law brings to Congress's attention important issues that members of Congress would prefer to duck. In this way, even if state law is preempted in the end, it is a catalyst for federal action that might otherwise never occur.

Giving Congress an incentive to take a stand is a valuable virtue. Individual congresspersons' votes reveal to their constituents their representatives' priorities. These votes give ammunition to candidates challenging incumbents. They mobilize voters who might otherwise be mystified by the banalities of TV ads. But such votes on tough issues are actually hard to come by. The reason is easy to guess: Incumbent congresspersons do not like taking political risks, and votes on controversial issues are always risky because it is impossible to know for sure how constituents will react. The electoral consequences of a vote depend



"Sorry, but all my power's been turned back to the states."

not only on public opinion but also on intangible factors such as the relative power of different interests to mobilize their troops. If given the choice, therefore, the average incumbent congressperson would prefer to duck controversy by cutting ribbons at federally funded pork-barrel projects and tracking down social security checks for grateful elders. Bills that threaten to arouse

jurisdiction can give industries an incentive to seek federal laws preempting state regulation even when federal laws could turn out to be relatively stringent. Of course, interest groups opposing preemption also have incentives to lobby Congress to reverse judicial decisions interpreting federal law to wipe out state protections for consumers, the environment, employees

The average incumbent congressperson would prefer to duck controversy by cutting ribbons at federally funded pork-barrel projects and tracking down social security checks for grateful elders.

public controversy can quietly die in committee, obviating a difficult floor vote. The result is a dearth of specific and serious policymaking in Capitol Hill.

Congressional incentives change immediately if the states shift the status quo in ways that step on the toes of industries. Congressional silence then is tantamount to a decision to burden a specific group, say the National Association of Manufacturers, with a heavy burden of multiple, possibly conflicting, state regulations. The fear of being dragged into the most aggressive state's regulatory system by permissive doctrines of choice of law or personal

and so forth. But these anti-preemption groups tend not to value regulatory disuniformity for its own sake: They simply want the toughest standard possible. By contrast, the interest groups favoring preemption value regulatory uniformity for its own sake, even if accepting uniformity means accepting a tougher standard. Thus, interests in regulatory uniformity and diversity are asymmetrically in favor of the former. The result is that industry groups can cooperate with public interest groups to preempt state laws for the sake of uniformity, but public interest groups will not cooperate with industry to eliminate federal

preemption for the sake of federal diversity. Repealing federal preemption, one would predict, is harder than enacting new preemptive law. Therefore, if one wants to get the issue of preemption on Congress's agenda, the safest bet is to interpret federal statutes, not to preempt state law.

The courts' decisions interpreting the Employee Retirement Security Act (ERISA) provide a good example of how preemption decisions can stifle or inspire congressional debate. Enacted in 1974, ERISA regulates employers' fiduciary duties under the benefits plans that they provide to their employees. The statute contains a clause providing that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." The apparent purpose of the law was to protect multistate employers from conflicting fiduciary duties in different states.

There is not a shred of evidence in ERISA's legislative history or text that Congress intended to protect third parties hired by employers from liability. Yet federal courts took the position in the early 1980s that states could not impose liability on managed care organizations (MCOs) for failure to provide medically necessary services under an ERISA benefit plan, because such liability "relate[d] to" such a plan within the meaning of ERISA's preemption clause.

As a matter of policy, ERISA's preemption of MCO liability seems odd for several reasons. First, ERISA does not have any provisions that deal with managed care, so preempting state-law liability will tend to create a regulatory black hole. Second, it is unlikely that Congress ever intended to deregulate the managed care industry in this way. MCOs barely existed when ERISA was enacted, because most benefit plans during the 1970s reimbursed fees charged for medical services. Immunity for MCOs, therefore, seems far from the original purpose of ERISA, which was to ensure that employers would not be subject to conflicting state demands. Third, MCOs do not seem to be afflicted with any serious risk of regulatory confusion if they are subject to state laws: The choice-of-law rules for medical malpractice are well defined and uniformly choose the law of the place where the medical service is performed as the relevant legal standard. Finally, the immunity from liability seemed to create perverse incentives: MCOs had nothing to lose by resolving all doubts about medical necessity against patients who would have

no right to recovery if they were injured or killed by an MCO's denial of service.

Not surprisingly, members of Congress made several attempts in the 1990s to cut back on ERISA preemption. These attempts suggest that the courts' attitude toward ERISA preemption has a big effect on Congress's willingness to confront the issue of MCO liability. In the early 1990s, bills to repeal ERISA immunity went nowhere. Between 1992 and 1994, five bills were introduced but none made it out of committee. By contrast, between 1997 and 2001, there was a blizzard of bills reported out of committee that cut back on ERISA preemption, and some versions of these bills passed a

during the summer of 2000, when House and Senate conferees faced an intractable impasse over their different versions of patients' rights. The decision immediately transformed the political incentives of the managed care industry and Congress. To plug the apparent hole in their ERISA shield, the industry had to ask for specific preemption protection from the 107th Congress. Members who supported a right to sue MCOs repeatedly brought *Pegram* to the attention of their colleagues. Perhaps as a consequence, every major "patients' bill of rights" introduced in the summer of 2001 contained some sort of right to sue MCOs along with limits on liability.

Why did one set of proposals die an ignominious and obscure death in committee, while the other provoked a full-fledged legislative battle?

floor vote every year in either the House or the Senate. The bills were all eventually defeated, but only after massive public-relations efforts from the MCOs.

Why did one set of proposals die an ignominious and obscure death in committee, while the other set provoked a full-fledged and highly visible legislative battle? One possible explanation is that the courts' preemption doctrine changed between 1995 and 2004. In particular, the Third Circuit held in 1995 (*Dukes v. U.S. Healthcare Inc.*) that employees could sue an MCO for the negligent treatment decisions of its physicians. Three 1997 decisions by the U.S. Supreme Court seemed to confirm *Dukes*. Between 1997 and 2004, 14 states quickly exploited this new opportunity to impose liability on MCOs. Just as quickly, Congress addressed the issue of preemption, urged on by the managed care industry. Between 1997 and 2001, the Republican leadership of the House and Senate repeatedly introduced various "patients' bills of rights" providing new remedies for patients aggrieved by MCOs but also limiting the scope of MCO liability. The pace of proposed legislation quickened even further after the Supreme Court's apparent retreat on preemption in *Pegram v. Herdrich*, 530 U.S. 211, 214 (2000), which seemed to assume that ERISA did not preempt what amounted to ordinary state malpractice liability arising out of an MCO's negligent exercise of medical judgment in denying plan coverage. *Pegram* was handed down

In 2004, the U.S. Supreme Court put an end to this ambiguity about the scope of preemption. *Aetna Health Inc. v. Davila* held that ERISA preempted liability of MCOs administering ERISA-covered benefits plans, thus preempting the Texas Health Care Liability Act. Not surprisingly, the stream of initiatives to address MCO liability ground to a halt. Although there are, no doubt, many reasons for the change in the congressional agenda, the Supreme Court's ERISA preemption jurisprudence should be on the list: *Davila* already delivered preemption to the Health Benefits Coalition, an industry lobbying group, sufficient to curb its appetite for further debate on the question. Ironically, at least two members of the *Davila* majority recognize that *Davila*'s view of ERISA is likely not Congress's view. Justices Ginsburg and Breyer, concurring in *Davila*, stated that *Davila*'s broad view of ERISA's preemptive force created a "regulatory vacuum" in which "[v]irtually all state law remedies are preempted but very few federal substitutes are provided." This black hole of regulator responsibility, however, might be the indirect result of the Court's own preemption jurisprudence: Having removed the prod of state legislation, the Court also removed Congress's incentives to take up a contentious issue. The result is a policy that a majority of no legislature, state or federal, has ever approved.

Could the Court design preemption rules that did not skew congressional

incentives so much toward inaction? One possibility would be for the courts to adopt the presumption that, absent clear indications to the contrary, state law does not conflict with the goals of federal law. Such a rule would be roughly analogous to the doctrine of deference to administrative agencies' interpretation of ambiguous federal statutes announced in *Chevron v. National Resources Defense Council*. Two purposes are frequently invoked to justify *Chevron*. The doctrine is said to economize on judicial resources and to ensure that democratically accountable agencies supervised by the president replace courts as the primary interpreters of federal law. A presumption against preemption of state law serves similar functions. Such a rule is easy for courts to apply: When in doubt, do not preempt. This would promote democratic accountability by encouraging Congress to take a stand on issues that individual members of Congress would rather avoid.

In short, one does not need to love federalism in order to hate preemption. Even if one distrusts state politicians, there is reason to believe that they can break congressional gridlock that can be just as costly as state incompetence. Courts can help states perform this function by refusing to find for preemption absent clear evidence that state law announces policies that contradict policy judgments contained in federal statutes. Lacking such evidence, the courts would be well advised to leave state law unpreempted, secure in the knowledge that congresspersons will have strong incentives to strengthen the statutes' preemptive force if this is the wish of their constituents. □

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A Model for Products Liability Preemption

CATHERINE SHARKEY exposes the Supreme Court's reliance on agencies and proposes a framework for preemption jurisprudence.



PREEMPTION IS THE FIERCEST battle in products liability litigation today. The stakes are high in this collision between common law tort and the modern administrative state. The regulation of public health and safety via tort actions falls within the traditional purview of the states. In recent decades, however, the federal government has played an increasingly significant role in the regulation of products.

The Supreme Court's products liability preemption jurisprudence is a small but expanding area that traces its beginnings to the early 1990s with *Cipollone v. Liggett Group, Inc.*, and continues, most recently, through the 2008 decision of *Riegel v. Medtronic*. At first glance, the Court's preemption jurisprudence in this realm is a nearly incoherent muddle. There appears to be little rhyme or reason to the Court's decision to allow plaintiffs' state law tort claims to proceed in some instances and to bar them at the threshold, on the grounds of preemptive federal legislation or federal agency regulations, in others.

When the Court decides that a state law claim is preempted, it is deferring to a pre-established federal regulatory policy and ensuring that that policy will be uniformly applied across state lines. In contrast, a decision to allow a state law claim to proceed usually means that other considerations outweigh the need for a uniform policy.

Is the Court the appropriate actor to decide whether a uniform national regulatory policy makes sense? The Court might be the first to say that it is not.

For a closer view of products liability preemption cases reveals an unmistakable pattern: In all but one case, the Court has adopted the position of the relevant federal agency as to whether the plaintiff's state law claims should be preempted by that agency's regulations. There are various ways in which a federal agency might inform the Court of its position: via regulations that are the outgrowth of formal notice-and-comment rule-making procedures; or, more informally, in a preamble to a regulation that it has issued; or in an informal interpretive ruling as to the

relationship between its regulation and state law tort claims; or by filing an amicus brief in a pending court case. Agencies sometimes argue that their regulations should preempt tort claims, and sometimes argue otherwise. What is clear is that whichever direction the agency's thinking takes, the Court follows suit.

But the Court only rarely acknowledges its reliance on an agency's position. And when it does, its discussion of precisely why, or the extent to which, it is relying on the agency's views is often cryptic at best. The Court only intermittently explains in these cases whether it is employing *Chevron's* mandatory deference to agencies standard or, instead, some lesser amount of deference. Consequently, it is difficult to understand where these cases fall in the body of administrative law as it is understood today.

I propose a new "agency reference model" to fill the doctrinal gap. The model serves two functions: a lens through which we might better understand what the Court has been doing for the past 16 years in its product liability preemption cases, and a prescriptive approach for the cases that it, and lower courts, will face down the road.

AGENCY REFERENCE MODEL

Not surprisingly, the thorniest preemption cases arise where Congress has been silent as to the preemptive effect of its own legislation; where a statute it has issued says nothing—or else says contradictory things—about the relationship of that law to state law claims. When Congress enacts piecemeal legislation concerning specific products, like the Motor Vehicle Safety Act, it has been anything but clear. Typically, these statutes include broad clauses that expressly preempt any conflicting state requirement. Congress usually says that state "requirements" or "standards" are preempted, using language that has been read by some courts to include common law state tort actions. These broad preemption clauses are coupled with very broad savings clauses that purport to leave common law actions intact. The tall interpretive task is left to courts and to agencies.

The agency reference model is an effort to clarify the relationship between these two actors, a relationship that is already firmly entrenched but one that needs direction and parameters, not only to provide coherence and predictability to the law in this area but also to guide courts to the optimal result in preemption cases.

Under this model, courts should look to agencies to supply the data and analysis necessary to determine if preemption is

appropriate; i.e., to determine when a uniform, national regulatory policy with respect to a certain product makes sense, and if so, whether a plaintiff's state law claims would conflict with that federal policy.

This model acknowledges and exploits the fact that agencies are best equipped to provide the information central to this determination, as the Court apparently already recognizes. Agencies regularly collect empirical data about the products within their jurisdiction and analyze whether the products' benefits outweigh the risks. And agencies are most intimately familiar with their own regulatory review processes. They themselves know best the extent to which a particular product was assessed before being put on the market.

An agency's role is significant for several reasons. First, there is a degree of regulatory scrutiny employed by the agency in its review and approval of products. In addition, an agency often contemporaneously weighs in on factors that arguably determine the preemptive effect of its regulatory actions.

Second, an agency may assume a distinct interpretive role as administrator of congressional legislation and can express its views in formal notice-and-comment rule making or less formal interpretive statements and preambles.

Finally, an agency may share its views in briefs before courts (including the Supreme Court) tasked with deciding preemption questions. Reliance upon federal agency interpretation at each of these three levels (issuance of regulations regarding preemptive scope; contemporaneous views interpreting regulatory action, and expressions of views in amicus briefs before courts) is contentious—increasingly so, with the FDA's move away from formal regulations toward less formal interpretive positions.

An important aspect of the model is that, in those cases where the relevant agency has not filed an amicus brief or otherwise made its views known to the court before which a preemption issue is pending, it would require that court to solicit the agency's opinion as to whether its regulation preempts the state law claim at bar. A court implementing this model would therefore have, at its disposal, the maximum information from the source best equipped to provide it, before making its own preemption decision.

At the same time, the model acknowledges that there is good reason to be chary of agencies acting in their interpretive, as distinct from regulatory, capacity. Most arguments for agencies' comparative expertise speak to the rigor of the product review



"These medicines all taste pretty good—let's approve them."

and approval process. While it is certainly the case that an agency might manipulate its regulatory record at the time of its product review, that danger pales in comparison to the risk of an agency's post hoc rationalization of its actions in litigation briefs, or promulgation of interpretive rules and preambles. For this reason, the model incorporates various checks on agency preemptive power.

DEPARTURE FROM THE CONVENTIONAL APPROACH

Previous interpretive approaches to the Court's products liability preemption cases all but ignore the role of agencies, and focus entirely upon Congress and the courts.

CONGRESSIONAL INTENT

The conventional take on preemption frames the question theoretically as a pure matter of statutory interpretation based upon congressional intent. But because Congress is so often silent, this approach only goes so far, and it opens the door to a more functional approach, centered on issues of tort and regulatory policy.

Given Congress's track record in failing to address squarely the question of preemption in the products liability realm, interpretive canons should, at least in theory, take on added significance. The

"presumption against preemption" in areas "traditionally occupied by the States" has acquired preeminent status.

To date, however, the Court's application of the presumption has been haphazard at best. The *Medtronic v. Lohr* Court, for example, began its preemption analysis with an invocation of the presumption: "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Paradoxically, the Court has applied the presumption when interpreting express preemption provisions (as in *Lohr*), but not when called upon to engage in implied preemption analysis, where it would seem more warranted given the absence of express statutory language. And it is striking that in the single implied preemption case in which the presumption is invoked (*Buckman Co. v. Plaintiffs' Legal Committee*), it is for the purpose of disavowing it, given the primacy of the federal interest at stake.

TOWARD A FUNCTIONAL APPROACH

Failure on the part of the more formalist statutory canons to explain the case law makes way for a more functional approach. Inherent in the functional approach that I have devised is the complicated question of the role of tort law in our society, a question

that has at least two answers that are often in tension. Tort law exists to compensate victims of wrongful conduct, and to provide them a mechanism to obtain redress for damages arising from a defendant's negligence or other wrongful acts. Tort law also serves the purpose of regulation; by imposing liability in certain circumstances, it establishes standards that potential defendants can choose to abide by or, where more efficient, to pay damages instead.

These "two faces of tort law" are, I posit, at the core of the products liability preemption inquiry. The Court's preemption determinations track its view of the role of tort law in a particular case. Where the Court has focused on the compensatory role of torts, it is less likely to find a plaintiff's tort claim preempted. When the Court has deemed paramount the regulatory role of tort law, it will find common law tort claims redundant of, and thus preempted by, federal regulatory legislation. A good example of the latter is *Geier v. American Honda Motor Co.*, where the Court, in preempting plaintiffs' claims arising from a car manufacturer's failure to install air bags, characterized the pro-plaintiff trial verdict as a "jury-imposed safety standard." In contrast, the Court, in declining to preempt a plaintiff's tort law claim in *Sprietsma v. Mercury Marine*, made a point of stating that common law claims serve an important remedial function.

While this approach may be a helpful guide to understanding why the Court has reached a particular result in a particular case, it falls short as a normative prescription for cases yet to be decided, as it does not explain when the compensatory role or the regulatory role of tort law should have primacy in any particular case.

PRECEDENTS VIEWED THROUGH AGENCY REFERENCE APPROACH

The agency reference model provides a satisfying explanation for Supreme Court precedent in the products liability context. Beginning with *Geier*, the case in which it was most candid about its reliance upon agency expertise, the Court, holding that plaintiff's claims were preempted, relied upon the National Highway Traffic Safety Administration's interpretation of the relevant regulation and upon its determination that individual tort suits would interfere with its regulatory objectives. The Court expressly recognized that the agency had the authority to implement that regulation and, furthermore, that the subject matter, i.e., the appropriate level of passive restraints in automobiles, was a technical one, and the history and background of the

regulation was "complex and extensive." The Court recognized that "the agency is likely to have a thorough understanding of its own regulation... and is 'uniquely qualified' to comprehend the likely impact of state requirements."

The Court tracked the FDA's pro-preemption position in *Buckman* and *Riegel*; and it tracked the FDA's anti-preemption position in *Lohr*, the NHTSA's anti-preemption position in *Freightliner Corp. v. Myrick* and the Coast Guard's anti-preemption position in *Sprietsma*. Only in *Bates v. Dow AgroSciences LLC* did the Court depart from the position asserted by the relevant agency (the EPA), and this was in large part on account of the Court's recognition that the EPA had taken an antithetical view in a nearly identical case only five years before, without any explanation of its change of heart.

Viewed through the lens of the agency reference model, these cases reveal that an agency does not always advocate preemption, as one might expect. The key point is that an agency, and not a court, is best equipped to decide between the two, and courts would be remiss in not taking such input into account.

NORMATIVE MODEL FOR JUDICIAL DECISION MAKING

Agencies are unquestionably a source to which courts should turn before deciding preemption cases in the products liability context. They are best equipped to determine whether a particular product is best regulated by means of a uniform federal policy, without potentially inconsistent results from state law claims, or whether state or local regulation is desirable. They can speak with intimate familiarity about their own review processes as concerns a particular product. Armed with such information, a court can determine the feasibility of a federal regulatory policy, the rigor with which a product has been tested, and, in turn, the necessity of additional compensatory or regulatory relief via tort suits.

FEDERAL OR LOCAL REGULATION?

Agencies can best determine whether federal or local regulation is the wisest course in the context of a particular product. Factors that tend to weigh in favor of federal regulation are the promotion of national uniformity, solving coordination problems between states that will otherwise export their regulatory costs to their neighbors, and the creation of economies of scale.

In contrast, state or local regulation is desirable where there are regional differences

in policy preferences, or where a uniform policy of regulation is unworkable, as shown in *Sprietsma*. There, plaintiff's state law claims stemmed from injuries allegedly arising from a boat manufacturer's failure to install proper propeller guards. The Coast Guard weighed in to explain that, at the time it considered the issue, there was no workable prescriptive rule of general applicability to all boats with respect to propeller guards, due to great differences between boats. The Court used this information to conclude that individualized tort suits made sense and that the claims should proceed. Because uniform federal regulation was unsuitable, local regulation in the form of tort claims was appropriate.

REGULATORY REVIEW PROCESS

Agencies can inform courts about the details of their regulatory review process. In *Lohr*, the FDA revealed that the medical device at issue had not been put to a rigorous review, and, instead, the manufacturer had received a special "grandfathering" dispensation, because its device was "substantially equivalent" to an existing device on the market. The FDA also explained that, at the time it issued its "substantial equivalence" letter to the device manufacturer, "[t]he agency emphasized... that this determination should not be construed as an endorsement of the [device's] safety." The Court therefore concluded that plaintiff's tort claims should proceed. In so holding, the Court essentially recognized that any federal regulation was actually incomplete, and that tort claims would neither be redundant nor upend an otherwise intact and comprehensive regulatory policy.

LEVEL OF APPROPRIATE DEFERENCE

The agency reference model does not insist upon a *Chevron* level of mandatory deference to agencies but instead on a *Skidmore* level of deference. Whereas *Chevron* requires a court to defer to an agency's interpretation of a statute where Congress has been silent and agency interpretation is based on a permissible construction of the statute, *Skidmore* holds that a court may defer to an agency's position if it finds that position persuasive.

This lower level of deference acknowledges the problems that might arise were a court to be held captive by an agency's position, and it is an effort to impose checks on agencies' power. Agency critics are quick to point out that agencies have, at their helm, human regulators who may have political motivations, self-aggrandizing agendas, tunnel vision or an inability to keep pace

with an ever-changing world. A *Skidmore* level of deference would protect against these potential issues. Moreover, this weaker level of deference also takes into account the very real problem of preemption, in some instances, leaving a plaintiff without any remedy whatsoever, and it gives courts leeway to avoid that result where appropriate.

THE MODEL IN ACTION

To illustrate the model, I turn to two very recent cases that have arisen in perhaps the most controversial area of preemption litigation today: prescription drug labeling. These cases, *Perry v. Novartis Pharmaceutical Corp.* and *Dusek v. Pfizer Inc.*, mark a reasoned, middle-ground approach in an area where previous precedents have gravitated to extremes.

The state law claims are those brought by individuals harmed by allegedly dangerous drugs against a drug manufacturer for failure to provide adequate warnings on the pharmaceutical label.

The federal statutory backdrop here is the 1962 amendments to the Federal Food, Drug and Cosmetic Act (FDCA), where Congress required that drug manufacturers establish that their drugs are both safe and effective as preconditions for FDA premarket approval. The statute expressly provides that nothing in the amendments “shall be construed as invalidating any provision of State law... unless there is a direct and positive conflict between such amendments and such provision of State law.” The amendments do not provide for a private right of action.

A major question in these cases is whether the standards that the FDA promulgates in the course of the drug approval context are minimal, or instead optimal, safety standards. The FDA has recently expressed its views on preemption in amicus briefs and, most recently, in a preamble to a 2006 prescription drug labeling rule: “FDA believes that under existing preemption principles, FDA approval of labeling under the act... preempts conflicting or contrary State law.” The FDA has justified its position in the interests of uniformity, expertise and safety concerns.

TWO EXTREME POSITIONS

Lower courts have gravitated towards opposing poles of the preemption spectrum. At one pole, courts have applied an extremely broad “presumption against preemption” to allow state law claims to go forward without any effort to ascertain the FDA’s views on the particular claims at hand. One case, *Levine v. Wyeth* (now pending before the U.S.

Supreme Court), went so far as to say that given the presumption against preemption, and the fact that the purpose of the FDCA is to protect health and safety, it was virtually inconceivable that any state tort action could be preempted.

At the other pole lie courts that, without reservation, grant *Chevron* deference to the FDA’s “misbranding” pro-preemption argument: that a manufacturer can never unilaterally strengthen or alter a label warning, lest it risk being prosecuted by the FDA for misbranding the drug. The FDA has said (correctly, in my view) that “State laws conflict with and stand as an obstacle to achievement of the full objectives and purposes of Federal law when they purport to compel a firm to include in labeling or advertising a statement that FDA has considered and found scientifically unsubstantiated.” But the FDA has (wrongly, in my view) maintained that state law claims should be preempted even when the FDA has not made a specific determination before the litigation as to the particular risk at issue. In other words, the FDA’s pre-market new drug approval process would grant drug manufacturers immunity from state common law tort actions (most often failure-to-warn claims), even in situations where new risks (of which the manufacturer was aware) come to light in the post-approval period.

AGENCY REFERENCE APPROACH

Applied to the drug labeling context, the agency reference approach would preempt state law failure-to-warn claims based upon a risk for which the FDA has made a specific determination. State law failure-to-warn claims would not be preempted where the FDA has not made a specific determination about a particular risk at the time the cause of action arises. That is, the mere fact that the FDA has not required a warning on a product label would not, in and of itself, preempt failure-to-warn claims; the FDA would need to have taken some action and specifically rejected a proposed warning, or reviewed evidence and chosen not to require a change, in order to justify preemption.

This approach relies upon courts’ ability and willingness to examine the FDA review process and to evaluate the reasons that the FDA proffers for its labeling decisions.

In *Perry* and *Dusek*, courts did just that. Interestingly, despite employing a strikingly similar approach, the *Perry* court held that the state law claims were not preempted, whereas the *Dusek* court found that they were.

At issue in *Perry* was whether a particular drug’s label should have indicated a risk of cancer. The FDA’s Pediatric Advisory Subcommittee, as the FDA explained in a letter to the court, had concluded that the available information was insufficient to indicate whether the drug did cause cancer, and the FDA took no position on the issue. The *Perry* court found that, in the absence of any specific FDA determination about the link between the drug and cancer, plaintiffs’ state law failure-to-warn claims should proceed.

In *Dusek*, the middle-course approach resulted in preemption. There, the court evaluated plaintiff’s claim that Zolofit labels should include a warning that the drug “can and does cause suicide in some patients.” But the FDA had, on at least four prior occasions between 1991 and 1997, considered such a warning and, each time, rejected it. The court determined that plaintiffs’ claims were accordingly preempted: “The Court does not hold that FDA drug approvals in general preempt failure-to-warn claims. The Court merely rules that permitting Plaintiffs’ claim would be authorizing judicially what the FDA already has expressly disallowed.... Plaintiffs’ failure-to-warn claim is preempted because it is in direct, actual conflict with federal law.”

The extent to which the FDA had considered and issued a conclusive determination as to the risk at issue in these cases was, appropriately, central to the courts’ approach. These cases are powerful endorsements of the agency reference approach, perhaps in no small part because their disparate holdings show that the model is ultimately “preemption neutral.”

THE ROAD AHEAD

Following on the heels of two products liability preemption cases decided last Term (*Riegel and Warner-Lambert Co. v. Kent*), *Wyeth v. Levine* is now pending before the Supreme Court. The Court is well poised to fashion a new preemption framework. The agency reference model might provide a start. □

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By the full-time faculty.
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Judaism and the Challenges of Modern Life

EDITED BY MOSHE HALBERTAL AND DONNIEL HARTMAN

The Bible orders the destruction of the pagan religions found in the land of Israel, because it does not allow for the existence of competing gods. For the adherents of monotheistic religions, it is not only important that the God that they represent be admired and worshipped; it is also important that he be the one and only God. The biblical God does not tolerate the worship of other gods alongside himself... The internal nexus between monotheism and exclusivity might lead to violence and intolerance. How do adherents of monotheistic faith confront the demand for exclusivity, particularly when accompanied by the call for total war against its rivals? This question became sharpened and exacerbated at the beginning of the present century, during which it seems possible that two monotheistic civilizations—Islam and Christianity—might stand against one another in a violent confrontation. Is it indeed correct to say that there is a connection between the structure of monotheism, and intolerance and violence? Is there a place in which monotheistic religions could move on from a clash of civilizations to a collaboration between civilizations? The negation of idolatry is the ultimate basis of Judaism. What is a possible approach of Judaism to this painful and complex subject?

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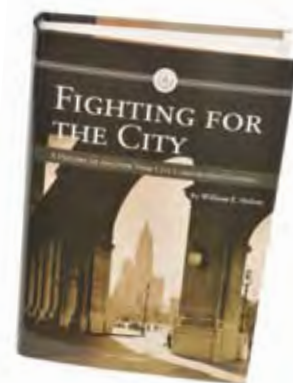
WILLIAM E. NELSON

“While New York City was growing, America was democratizing. When they rejected monarchy in the Declaration of Independence, Americans forced themselves to invent a new form of government, and slowly, over the half-century that followed, the nation as a whole, and the city in particular, moved in the direction of government of the people, by the people, and for the people. Together with New York’s enormous growth, which fueled the city’s demand for legal services, democracy transformed the job of the city’s legal advisor. Increasing legal needs tended to professionalize the office, while democracy tended to politicize it.

By the time he assumed the office of Recorder in 1798, Richard Harison, the last man to serve the city simultaneously both as Recorder and as lawyer to the corporation, found that he could not personally perform all the tasks of the office.... Accordingly it became necessary to employ additional outside counsel as assistants. The Common Council authorized Harison to do so, but the authorization raised a problem. Traditionally, the Recorder had been compensated by fees provided to all judges and lawyers under a state fee schedule.... Other work, such as advising the council or drafting legislation for it, had been provided for free. As Harison’s work increased and he needed to hire others to substitute for him, he faced an impossible choice: either he had to pay other lawyers to do the work for which he received no compensation or he had to give them the fees for compensated work and perform all the uncompensated labor by himself. In the end, he avoided having to choose by asking the Common Council to pay him for the work previous Recorders had done without pay, and the council agreed to give him a \$500 annual retainer.

The retainer and the authorization to employ assistant counsel altered the character of Harison’s position. When the office of Recorder had first been created in the seventeenth century, everyone knew that the man whom the Governor appointed to fill it necessarily would serve as a judge on the city’s court and as the city’s legal counsel. That was what English Recorders always had done, and what they always had done defined the office. But now the Common Council, the city’s elected legislative body, exerted its local, popular power by appointing counsel of its own choice. Harison or lawyers substituting for him would now act as attorneys for the city not because the Governor had appointed them Recorder but, at least in part, because the Common Council had created a mechanism for retaining and compensating lawyers to represent it. And those lawyers would be responsible not only to the Governor and to centuries of customary law, but to the electorate of New York City.

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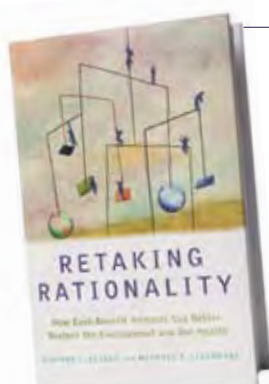
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Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health

RICHARD L. REVESZ AND MICHAEL A. LIVERMORE

“Progressive groups have had many important successes in challenging the status quo by framing their arguments in terms of individual rights. The civil rights movement provided the template for other important social justice movements like the women’s and gay rights movements, and the environmental justice movement. There are important tactical advantages to arguing in terms of rights—perhaps most important, for these groups, has been access to the courts as a lever of power to move their agendas. Rights-based arguments are also professionally attractive to the cadre of lawyers that staff many proregulatory groups. And the rhetoric of rights resounds strongly within the American public. Because cost-benefit analysis argues in terms of aggregate welfare, rather than individual rights, it is unfamiliar to many progressive organizations. That does not mean, however, that it is ineffective.

The same story can be told in many ways. In order to reach as broad an audience as possible, proregulatory groups must be able to tell their stories so that every sector of American society can hear them. Environmental, consumer, and labor organizations know how to tell compelling narratives of the consequences of governmental failure—the children with asthma, the young father crushed in an industrial accident. These stories are important and should be told. They galvanize public support, and speak to our essential humanity by calling on our compassion for the troubles of our fellow human beings. But such narratives can lose their power in judicial or regulatory proceedings—in the eyes of judges or regulatory agencies, these are soft and unscientific, mere anecdotes that lack concrete, quantifiable meaning. And there are many Americans who require not only individual stories, but hard numbers to convince them that regulation is justified. It is in these contexts that proregulatory groups can reach for cost-benefit analysis. The heart of any movement may be individual stories of hardship and struggle, of injustice and redemption. But at some point, reason—coolly calculating, rational, disinterested—must be applied. Proregulatory groups need not lose their souls in order to embrace cost-benefit analysis. They only need to be reminded that reason is often on their side as well.

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Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law

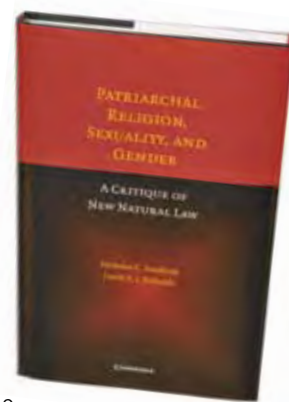
NICHOLAS C. BAMFORTH AND
DAVID A. J. RICHARDS



[W]hat motivates the new natural lawyers' [quite bad normative] arguments? We offer... a historical, cultural, and psychological study of the impact of patriarchal assumptions

on the formation, development, and continuing existence of the Catholic Church's traditionalist views concerning sexuality and gender. We consider how such patriarchal views arose in the works of Saint Augustine and Saint Thomas and on this basis evaluate the motivations that led the new natural lawyers to defend such views today in the way that they do. We argue that whatever may once have been a reasonable basis for such views, they are today demonstrably unappealing in substantive moral terms. If this analysis is correct, then the new natural lawyers' arguments about important questions of individual liberty and public and private morality—relating to marriage, the role of women, lesbian and gay sexuality, pregnancy, contraception, and abortion—can be seen as playing a role in unjust contemporary rationalizations of constitutional and moral evils such as sexism and homophobia. In many ways, these points go to the heart of our critique: for we suggest that the new natural lawyers' argument will strike anyone with a concern for individual liberty as being morally unappealing (indeed, radically so) and as unintelligible without a prior commitment of a sectarian religious nature. The new natural lawyers' underlying motivation is to defend the authority of a patriarchal Church, with a rigid and unchanging set of doctrines, against reasonable internal criticism from other Catholic thinkers and reasonable external criticisms from society at large. The legitimacy problem currently posed by patriarchal Papal authority is, we argue, well illustrated by the Catholic Church's inadequate response to the recent priest abuse scandal in the United States. Viewed in this light, new natural law must ultimately be seen as a defense of anachronistic patriarchal religion, a key reason for thinking that the theory's arguments cannot be acceptable in modern-day [secular] constitutional democracies.

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Releasing Prisoners, Redeeming Communities

ANTHONY C. THOMPSON

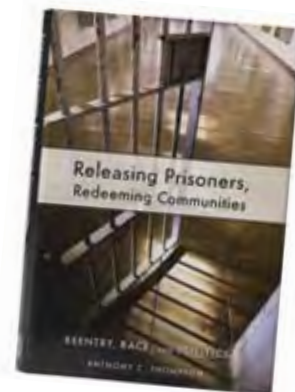


Years after becoming a law professor, as a participant in criminal justice meetings and in conducting Socratic dialogues with judges, often I heard them say, 'Oh, I have learned so much about relapse and recovery. I remember when I used to send someone to prison for one dirty test.' Strikingly, as we developed our knowledge base, we did not go back and adjust sentences or sentencing schemes to compensate for our new knowledge. Rather, the criminal justice players and policy makers simply sat back idly and let a generation of young men and women, most often persons of color, sit needlessly and uselessly behind bars. Too often, those men and women received no treatment, vocational training, or education.... Slowly, the political discourse began to include and embrace broader notions of punishment and community corrections. But reconnecting with the community is difficult for recently released individuals. We never stopped to think that limiting access to education and vocational training would make reentry so terribly challenging.

At the same time, no one focused on the fact that employers habitually discriminated in hiring ex-offenders. Moreover, by limiting access to drug treatment both inside and outside of prison, we did not recognize that the temptation ex-offenders faced upon release was a recipe for disaster. We spent so much time trying to fend off the incredibly long and harsh prison sentences that we lost sight of how our clients were being transformed in prison.... We didn't anticipate the long-term negative consequences of the policies that were developing.

Racial imagery, mixed with police practices and racial profiling, transformed our society. The confluence of pervasive media images, popular culture, and our nation's history has led us to an almost unconscious acceptance of racial stereotyping and a deep-seated fear of people of color.... A collision course of race, and the pre-suppositions about crime, and the tacit acceptance of police misconduct began a chain of events whose effects and implications we are only now beginning to feel.

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Student Spotlight

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.....

The Class of 2010 divided into four sections to compete in a year-long series of student orientation events including an all-New York City scavenger hunt, an NYU School of Law trivia contest—see the cheering crowd above—and a variety of health, wellness and community service activities.



TREASURED CONNECTION Gandhi received her award plaque from former U.S. Secretary of the Treasury Robert Rubin.

Many Happy Returns

Sima Gandhi finds her tax law studies literally rewarding.

WHILE LOOKING THROUGH TAX materials as a second-year summer associate at Simpson Thacher & Bartlett, Sima Gandhi '07 (LL.M. '10) discovered that tax law intrigued her more than corporate litigation. "There are gray areas, and part of understanding them is grasping the intent behind it and the legislative history," she said. "I found it made even reading the paper a little more interesting because you understand to a greater degree why something was relevant in Congress."

Returning to law school in the fall, Gandhi dived into tax, taking five tax courses in her third year. "[Associate Professor Lily] Batchelder looked at me like I was nuts,"

she said. "It was a late-developing interest, but I love it and I'm glad I went with it."

Gandhi found herself challenged in learning so much tax law in one year, but her enthusiasm didn't flag. She took Professor Leo Schmolka's demanding Corporate Tax class at the same time as the basic income tax course. On Acting Assistant Professor Joshua Blank's Tax Procedure and Timing, she exclaimed: "He's such a fantastic teacher that he even made tax procedure interesting, and that's about filing forms!"

It was while taking Batchelder's Tax and Social Policy seminar that Gandhi had the inspiration for an A-paper that proposed increasing college enrollment among low-income students by accelerating student loan

subsidies. Gandhi identified inefficiencies in the government's subsidy process, and felt that improving the system was crucial. "It's just common sense," she says. "In terms of equality of opportunity and creating a more democratic society, education is one of the pillars to get there. Forget about welfare. If you don't give people hope and the chance to have an education, how are they supposed to climb the ladder?"

With Batchelder's encouragement, Gandhi submitted a condensed version of the paper to the Brookings Institution, winning its inaugural Hamilton Project Economic Policy Innovation Prize for the most "innovative policy proposal" written by a graduate student; the selection committee included former Congressional Budget Office Director Alice Rivlin and former Treasury Secretary Robert Rubin. In addition to a \$15,000 award, Gandhi was invited to a writer's conference to help her turn her plan into a discussion paper published by the Hamilton Project.

Now a tax associate at Simpson Thacher, Gandhi has not ruled out the possibility of working in the public sector someday. The beauty of tax law, she says, is that "it does blend a very real private-sector practice with the potential to go to D.C. It's not a surprise, considering how strong a marriage there is between social policy and the practice of tax law." This unique mix, says Gandhi, is why tax law is never boring. "It's not just common law judicially dictated. It's Congress, it's politics, it's lobbying, it's budget constraints. So many factors go into it.... It's an evolving beast."

Having the chance to publish her tax paper profoundly affected Gandhi's law school experience. "It showed me that there is a very real possibility that ideas can make a difference," she says. "I find that incredibly rewarding." □

A Survivor of Secret CIA Detentions Gets a Voice

Little is known for sure about the CIA's secret detention facilities, or "black sites"—such as where exactly the sites are located and the identities and number of those imprisoned. This is why students and faculty from NYU's International Human Rights Clinic and the Center for Human Rights and Global Justice spent countless hours taking the testimony of Mohamed Farag Ahmad Bashmilah, a Yemeni national who spent more than a year and a half in CIA detention and lived to tell the tale. His experience was published in a report, "Surviving the Darkness," based on the work of clinic students Reena Arora '08,

Jama Fakhri '08, Michael Price '08 and Brenda Punskey '09. The report is unprecedented and groundbreaking because, said Margaret Satterthwaite '99, faculty director of the center, it presents "the first-hand experience of one of a handful of people walking around who can talk about what it was like to be held at a CIA 'black site.'" Prior to these revelations, the clinic joined the American Civil Liberties Union in August 2007 in a lawsuit against Jeppesen Dataplan, Inc., a subsidiary of the Boeing Corporation, alleging that Jeppesen provided flight services to transport Bashmilah and four others to the detention centers.

The case was dismissed in February by the U.S. District Court for the Northern District of California, on the basis of the state secrets privilege, but the case is on appeal to the U.S. Court of Appeals for the Ninth Circuit.

Satterthwaite said that hearing Bashmilah's story was difficult, but that her students had learned important lessons. "Although it can be painful for students to hear about their clients' experiences of abuse," she said, "it is also important for them to learn how empowering such legal storytelling can be."

Witness for Justice

SOMETIMES BLIND JUSTICE REQUIRES eyes—or so goes the philosophy behind the Detainee Working Group (DWG) begun by Reena Arora '08 two years ago to help improve the experience of defendants at the U.S. Department of Justice's Immigration Court.

As a 1L, Arora became aware of a similar group that had been started in Massachusetts, and decided to launch her own version in New York. Arora's concerns with problematic courtroom procedures were broad: lack of proper translation services; the need for information on basic rights to relief in the immigration system; mistreatment of and bias against defendants, and collusion between government attorneys and judges.

Arora, who spent two years working on human rights issues in India, Thailand and South Africa before enrolling at NYU, developed a simple but apparently effective solution: Students would be assigned as observers in the courtrooms of the Immigration Court, where Department of Homeland Security attorneys bring cases against immigrant detainees. Arora described her initial impressions of Immigration Court in a speech in Washington, D.C. last October, when she received the LexisNexis Martindale-Hubbell Exemplary Public Service Award from Equal Justice Works in recognition of her role in creating the DWG. "Immigrants were brought in wearing orange jumpsuits and shackles, treated like criminals for what is a civil violation," she said. "Their lawyers came in mumbling and rambling, rarely having the adequate defenses, and the interpreters barely

interpreted one-tenth of the proceeding, leaving most of the immigrants incredibly confused. I remember thinking, 'Here their rights aren't being protected, and these people are stripped of all the human dignity that they have.'"

Arora believes that the DWG's work has made judges more conscientious and less arbitrary. David Stern, chief executive officer of Equal Justice Works, said, "The students help assert procedural due process rights—and keep our country's promise of equal justice under law. We applaud Reena's passion and commitment to public service."

The hearings in the Immigration Court system, in which more than 50 courts nationwide are not subject to the same standards of due process required of regular courts, are only a small part of the immigrant detainees' world. Detainees are often sent elsewhere to receive hearings by detention commissions; many removal proceedings take place in prisons and jails. But, in two tiny courtrooms in a nondescript building on Varick Street, Arora says law students are "trying to help restore due process in a small way." □

Students Win Grants

Reena Arora and Anna Gay have received 2008 Helton Fellowships from the American Society of International Law. The fellowships, honoring refugees' rights advocate Arthur C. Helton, include microgrants of up to \$1,500 for research and fieldwork related to international law, human rights and humanitarian affairs. Arora '08 will work to enlarge the capacity of the Migrant Assistance Programme (MAP), an organization addressing Burmese migrant worker issues in Thailand, by instituting an international human rights framework for the organization, bolstering its capabilities for regional and international advocacy, and assisting workers in defending their rights through strategic planning. Gay (LL.M. '08) will work with the United Nations High Commissioner for Refugees in Bangkok, Thailand. Her research will examine Thailand's selection of asylum seekers under its resettlement policies and how that fulfills its international obligations under the 1951 Geneva Convention.



A Victory on Drug Misdemeanors



After arguments made by students in the Law School's Immigrant Rights Clinic, the Board of Immigration Appeals ruled en banc last December that legal immigrants with one or two state drug possession misdemeanors should not be treated as though they had been convicted of federal drug trafficking felonies.

The victory is the result of previous work by students in the same clinic, such as the U.S. Supreme Court's agreeing to hear a case in 2006 in which it decided that state drug possession charges should not be automatically treated as felony drug

trafficking offenses. "This may seem obvious," Professor of Clinical Law Nancy Morawetz '81 said, "but hundreds of legal permanent residents were being deported on these charges." Despite the victory—credited to work by students Caroline Cincotta '07, Carlin Yuen '07, Mandy Hu '08 and Hays Fellow Kristen Connor '08, who all collaborated with the Immigrant Defense Project—"the struggle continues," Morawetz said. The Board maintained that if a court of appeals rules differently, it will follow the court's lead, as it has already done in several circuits.

An Economist Calls for Legal Action



RENOWNED ECONOMIST JEFFREY SACHS sounded the alarm in his keynote address at the 12th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium, in which he spoke out for long-suffering children living a continent away: “There is no question that the state of Africa’s children is a state of dire crisis, and pervasively so in all parts of sub-Saharan Africa. Sub-Saharan Africa is really the epicenter of the global development challenge.”

Sachs confessed that Africa’s problems were not his areas of expertise or interest until a dozen years ago, but when he became acquainted with that region, he felt compelled to learn more, because “the sense of death and vulnerability everywhere was overwhelming.” He ran through a series of sobering statistics in laying out the dimensions of the crisis, whose aspects include Africa’s extremely young population structure, deficient health care, lack of education, widespread orphanhood, violence, gender inequities and, finally, a lack of employment opportunities for those children who do reach adulthood. The problems begin with a lack of resources at the pre- and neonatal stages and snowball from there. On average, 16.3 percent of sub-Saharan African children die before age five.

“There’s no reason for these deaths,” said Sachs, director of Columbia University’s Earth Institute. “These are deaths from readily preventable and treatable causes.”

Simple, low-cost medical solutions exist, he said, but the international community has not delivered them on an adequate scale.

The reason is that international law is too easy to neglect. “I don’t actually believe that there’s really something so qualitatively different between domestic and international law, that here you have a sovereign to enforce the law and with international law you don’t,” Sachs said. “In both cases, domestic and international law survive because people believe in it, subscribe to it, and follow it as a norm.”

The solution—wisely applied, low-cost interventions—is obvious, Sachs concluded. And our international agreements to contribute significantly to those solutions already exist. The key is to enforce them. “We’re letting it happen. It’s contrary to all the international promises that have been made over the years, and also contrary to the Universal Declaration of Human Rights, the constitution of the World Health Organization,” he said, “and a lot of the rest of international law.” Exhorting law students in the audience to take action, he said, “So I want you to take someone to court, basically....At a tiny fraction of what we’re squandering in Iraq right now killing people, we could afford to make universal access to health care a reality just by ourselves alone, much less in partnership with the other rich countries of the world. This is about choice, it’s about rights, it’s about law. Go at it.” □

Student Symposia

Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?

Annual Survey of American Law

University Professor Jeremy Waldron, Thomas Phillips, former chief justice of the Texas Supreme Court, Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts and others explored the tensions between judicial independence and democratic transparency.

Breaking the Logjam: An Environmental Law for the 21st Century

Environmental Law Journal, see page 92

Contemporary Issues in Private Equity after the Credit Crunch

Journal of Law & Business

Private equity players examined the economic and political forces behind the credit crunch, the way they are dealing with current challenges, and the impact on how deals are done today and will be done in the future.

Rule of Law Symposium

Journal of Law and Liberty

Legal scholars David Dyzenhaus, Richard Epstein, Trevor Morrison, Peter Strauss, Brian Tamanaha and Jeremy Waldron debated normative visions of the rule of law, applied rule of law theory and experience to the rule of law after 9/11, and examined the relevance of the rule of law in the modern administrative state.

Leviathan’s Network: Municipal Wireless and Civil Liberties

Journal of Legislation and Public Policy

Despite recent uncertainties in the municipal wireless market, cities across the country continue to build their own Wi-Fi networks. Panelists explored the unique legal questions raised by these networks, with particular attention to users’ First Amendment and privacy rights.

The Hart-Fuller Debate at Fifty

NYU Law Review, see page 97

Alternatives to Mass Incarceration: Promises and Challenges

Review of Law and Social Change

The U.S. prison system is in crisis due to prison overcrowding, recidivism and the harsh impact of incarceration on minorities and the poor. Panelists considered the viability of alternatives from theoretical and practical perspectives.



Scholarship Reception

A SHOW OF APPRECIATION 1 Trustee George Lowy '55 and Cravath, Swaine & Moore LLP Scholar Sandra Mayson '09; 2 Craig Medwick '77, U.S. managing partner of Clifford Chance; 3 Trustee Evan Chesler '75 with Evan and Barbara Chesler Scholar Mario Ortega '10; 4 Trustee Leonard Wilf (LL.M. '77) with Wilf Tax Scholar Cristiane Coelho (LL.M. '08), left, and Wilf J.D. Merit Scholar Marianna Konnaya '10; 5 AnBryce Scholar and Carroll and Milton Petrie Scholar Helam Gebremariam '10, left, with Chandra Johnson, executive director of the AnBryce Foundation; 6 Trustee Kenneth Raisler '76 (second from right) with Sullivan & Cromwell Public Interest Scholars Jeanette Markle '10, Anna Purinton '09 and Nick Durham '08; 7 Gail Quackenbush, left, a member of the Jacob Marley Foundation board of directors, with Leah Morfin '10, Diana Holden, Jacob Marley Foundation executive director, and Nicholas Fogg '10. Morfin and Fogg are recipients of the Jacob Marley Foundation Scholarship in memory of Chris Quackenbush '82.



THE WISE AND THE WORTHY Standing: Starr Foundation Global Law School Scholars Jan Bischoff (LL.M. '08) and Petr Briza (LL.M. '08); C.V. Starr Scholars Margot Pollans '10, Jonathan Horne '09, Andrew Gehring '09, Jeffrey Goetz '09, Christopher Turney '08 and Andrew Lin '10; Starr Foundation Root-Tilden-Kern Scholar Elizabeth Lynn George '10, and Ernest E. Stempel Foundation Scholar Rachel Williams '10. Seated: C.V. Starr Scholar Mingpei Li '10 with Ernest Stempel (LL.M. '48, J.S.D. '51) and Brendalyn Stempel.

Win by a Loss

In retaliation for last year's close NYU win, Columbia's law students routed NYU's at the seventh annual Deans' Cup last April. From the first basket of the evening, the Lions were ahead and never fell off their pace. The final score: 83 to 68. The 10-minute faculty half-time game provided no relief, either, as the Violets suffered from a clear height deficit against the scholarly six-plus-footers who showed up for Columbia.

This year's Deans' Cup raised more than \$140,000 for public interest law programs; the pot will be evenly split by the two law school rivals. Since 2002, the games have raised more than a half million dollars.



The Sirens' Song

Homer's epic poem provided the broad outline for *The Lawdyssey*, the 2008 student-produced Law Revue.

You've Been Served: Public Interest Auction Raises \$140,000

DAVID JACOBSON '10 DEMOLISHED Dean Richard Revesz in a best-of-three set of video tennis. But Jacobson's athletic domination was altruistic; he had paid \$350 for the privilege of doing so at the 2008 Public Interest Auction. All the monies raised that evening go to fund students who take public-service summer internships.

Revesz arrived at Tishman Auditorium ready to attack the net in a '70s-era ensemble of a terrycloth sweatband worn across the forehead, Adidas warm-up jacket and striped athletic socks pulled up to his calves. He even carried a wood-framed racket. "It was clear, based on the dean's ground strokes, lateral movement and John McEnroe apparel, that he's a far better tennis player than I'll ever be," Jacobson said. "Unfortunately for him, Wii Tennis has absolutely nothing to do with real tennis."

Jacobson shut out Revesz 2-0 during back-to-back play. Afterward, the two fierce competitors shook hands and celebrated with champagne. Revesz even signed a few tennis balls and flung them to adoring spectators.

"It's wonderful that NYU makes it possible for students, including me, to do public interest work over the summer," said Jacobson, who used his grant to work for the U.S. Treasury Department in the Office of

Terrorist Financing and Financial Crimes this summer. "It's a privilege to contribute to next year's class, and it was a blast to play Dean Revesz." Other auction-goers showed their generosity by bidding big bucks for the use of faculty- and alumni-donated vacation homes in upstate New York, tickets to attend a Yankees game with NYU's President John Sexton, VIP NASCAR box seats and brunch at the home of Dean Revesz and Professor Vicki Been '83.

The final tally from bids made during the live and silent auctions totaled \$140,000. This year, the Law School reaffirmed its already strong commitment to public service by increasing the amount of summer grants: First-year students can receive \$4,500, up from \$4,000; 2Ls receive \$6,500, up from \$5,000.



GAME ON Dean Revesz getting psyched up for his match

But the Jacobson-Revesz rivalry is not over yet. The dean is rumored to be training for a rematch. "He's got a competitive fire in him," says Jacobson, "so I'm sure it will be a much closer match next time around." □



AT THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE NJISJ intern Jewel McGowan Watson, Gregg Stankewicz '10, Trisha Trigilio '10, Jarrod Loadholt '10, NJISJ Legal and Policy Counsel Laurel Dumont, Mayor Cory Booker, Angela Gius '10, Daniel Meyler '09, Molly Tack '09 and NJISJ Senior Counsel and Policy Director Craig Levine '91.

AT NEWARK CITY COUNCIL CHAMBERS Gius, Tack, Meyler, Trigilio (seated), Loadholt, Stankewicz.

Spring Break Across the Hudson River

One student finds inspiration and encouragement when she volunteers to provide legal services for a week to needy and neglected residents of embattled Newark, New Jersey.

MAKING YOUR WAY INTO THE World Trade Center PATH station at 8:30 on Monday morning is like being a lone salmon swimming upstream to spawn. One escalator at the station descends to the trains headed to Jersey, while seven ascend from the platforms, carrying Newark residents from their affordable housing to their jobs in lower Manhattan. Even though lower Manhattan is in many ways still reeling from the devastation of 9/11, the economic opportunities it offers to the people of Newark sparkle in comparison to the prospects available at home, a once-thriving center of industry where, today, the city government is Newark's largest employer.

Along with five other NYU Law students, I made this counterintuitive commute daily for a week in March to the New Jersey Institute for Social Justice (NJISJ) as part of the Alternative Spring Break (ASB) program of Law Students for Human Rights (LSHR)—a week of working, observing and learning.

Last spring, when the Public Interest Law Center first urged LSHR to consider Newark, I thought we might have trouble selling the city as an appealing spring break destination, even to the most public interest-minded law students—and then, in May, I saw Cory Booker speak at NYU Law's convocation.

Booker related to the Class of 2007 how, as a young Yale Law graduate living in a violence-plagued Newark housing

project, he learned from his neighbors to see beneath the troubled surface of the world around him. Tears streamed down my face. He impressed upon me the impact my classmates and I could make just by the way in which we live our lives. "Stand tall," he said.

Less than a year later, I was standing before the mayor with my fellow spring breakers at a meeting arranged by NJISJ. Booker was every bit as inspiring in the intimate meeting as he had been on the stage of Madison Square Garden. He asked each of us in turn about our backgrounds, interests and ambitions, engaging us on topics ranging from high school nicknames to same-sex marriage. Although Newark is the largest city in New Jersey, Newark's public interest lawyers and community organizers emphasize how small and close-knit their community feels to them.

During the week, the six ASB interns took turns working on behalf of Reentry Legal Services, one of NJISJ's partners, calling ex-offenders to offer legal services. I spent hours on the phone on behalf of one man, recently released from prison, who suffered from short-term memory loss and cognition difficulties, helping him to navigate an expansive array of entities comprising the Motor Vehicles Commission and several municipal courts whose approval he needed to get his driver's license restored. This was necessary for him to be eligible for most of the

employment that was available to ex-offenders. Other students drafted petitions to expunge stale criminal records, including a petition on behalf of a 40-year-old client who had just been denied a job promotion because of a conviction for shoplifting when she was 17.

Our work with NJISJ also touched on New Jersey handgun regulation, an integral part of Booker's public safety platform, as well as collateral damage from aggressive law enforcement policies, such as a "juvenile waiver" rule that meant that young defendants accused of certain crimes were automatically tried as adults. Our accomplishments were modest, but had an impact nonetheless.

For me, the week was an opportunity to take a step back from school and draw encouragement from the inspiring people around me—from the Newarkers overcoming major obstacles every day just to survive to the attorneys advocating for the city and still making time to embrace us visitors with open arms, to our site leader, Dan Meyler '09, who spent months learning about Newark, attending conferences, and making connections in order to present us with the array of hands-on opportunities that we enjoyed. I got to remove my law school blinders and see a troubled New Jersey city as something else—a testament to America's urban plight, but also to its enduring spirit of revitalization, just five miles from Manhattan. □ Molly Tack '09

Civil Rights after the Flood

Sheinberg lecturer deplores atrocities in New Orleans.

IN THE THREE YEARS SINCE HURRICANE Katrina hit the Gulf Coast, Tracie Washington has done more to protect the rights of New Orleans' poor citizens than many people do in a lifetime. She has litigated cutting-edge civil rights issues in the fields of housing, education and health, has served on the board of a new charter school, and has founded and led the Louisiana Justice Institute, all while raising a son. A native of New Orleans, Washington had maintained a general civil rights practice and had served as general counsel to the New Orleans public school system until the appalling events following Hurricane Katrina compelled her to greater action. In "The Dog Ate My Hospital: Fighting Civil Rights Atrocities Post-Hurricane Katrina," the 14th annual Sheinberg Lecture, Washington, president and CEO of the Louisiana Justice Institute, discussed her work and the lessons she has learned in the process. She described how

Hurricane Katrina did not serve as a spotlight on holes in the safety net, as is often suggested, but rather revealed the "deliberate removal of the social safety net."

Her speech emphasized the importance of individuals and the role they can play in creating change and fighting injustice. She fondly described Miss Lucille, a named plaintiff in Washington's lawsuit to reopen "Big Charity," formerly New Orleans' largest public hospital. Miss Lucille came forward to participate in the lawsuit declaring, "I want you to use me to get the hospital reopened because I know people need help."

Washington refuses to allow Katrina to provide a blanket excuse for bureaucratic dysfunction and racism: "Katrina did not do everything; people have done this to us." She challenged audience members to consider the implications of the demolition, with minimal replacement, of thousands of public housing units in a city whose economy runs on low-wage



workers; the dissolution of the New Orleans public school system and adoption of a charter school privatization plan with little accountability. She connected the consequences of these policy decisions to the lives of her clients: the family members who cannot return home and the generation of black children who have unwittingly become part of an educational experiment. By thinking creatively about advocacy strategies, she said, "We can have a just society." □

Korematsu Lecture: Labels Cannot Be Used to Deny Basic Rights

KAREN NARASAKI HAS A HABIT OF ASKING uncomfortable questions. In a meeting with the CEO of Wal-Mart, Narasaki, the president and executive director of the Asian American Justice Center, wondered why there were no Asian Americans on

indiscriminate rounding up and detention of Muslims, Arabs, South Asians and other specific groups based on racial profiling.

But perhaps the hardest question she ever asked was directed to her parents, as Narasaki recounted when she delivered the ninth annual Korematsu Lecture. The question concerned the infamous mass internment of Japanese Americans such as Fred Korematsu during World War II. Narasaki had been unaware that both her parents had been interned; in fact, she had known nothing about that historical episode.

"I heard about the internment in a junior high school social studies class, and I was stunned," Narasaki recalled. "I went home and I asked my parents, 'Do you know about this?' And my mother started crying, and my father started yelling at me for bringing it up. The pain and the bitterness and the shame in my parents' eyes is still very much seared into my heart." She shed tears while telling the story.

Stressing the importance of sharing stories about discrimination, bringing more Asian Americans into legal aid services and the courts, and speaking out against anti-immigrant sentiment and questionable government policies, Narasaki also talked about the power of language. Her parents, born in the United States, had been labeled "non-alien," she said, "to disguise the fact that we were really talking about imprisoning citizens without any due process of law."

Drawing parallels between the government's actions during World War II and its current policies, Narasaki argued that "the fact that we're still holding people in Guantánamo, claiming that they have no rights under our constitution or anybody else's or military law or international law, is beyond outrageous, and the fact that President Bush is still trying to argue that waterboarding is not torture is an embarrassment for all of us."

"We employ such phrases as 'enemy noncombatant' or 'illegal immigrant' in an attempt to justify the denial of basic rights," she said. "It reminds me of the use of 'non-alien' because it's so dehumanizing and makes us forget that we're really talking about parents, their children and their grandparents." □



Narasaki with Bo Han '09 of the Asian Pacific American Law Students Association Korematsu Lecture Committee

the corporation's employment practices advisory panel. After 9/11, she met with the deputy attorney general of the United States and asked him about the often

No Small Change

UPON HIS HONORARY INDUCTION INTO the Order of the Coif, NYU School of Law Trustee Daniel Straus '81 urged the best and brightest of the Class of 2008 to apply their knowledge to big ideas. "Academic excellence is tremendous, but it's what you do with this that really [matters]. If it's simply put in a drawer or used for individual purposes, that's not what this law school is about, and what has impressed me about the Law School is all the people that go out into the world and change it."

Straus continued, "Something else that has impressed me in all my dealings with the Law School: There's a sense of purpose here, there's a mission here, there's a culture here. It pervades and permeates everything."

In 1984, Straus and his brother Moshael inherited a family business of four nursing homes from their father, Joseph Straus '37 (LL.M. '43). From this modest base, the brothers built Multi-Care, which at one point had 17,500 beds in 11 states and 170 skilled nursing and assisted-care facilities. In 1997, the Straus family sold Multi-Care for \$1 billion. Straus is now the chairman and CEO of Aveta, which integrates health-care provider networks in Medicare to serve the elderly and chronically ill.

In 2002, Straus honored his father by endowing the Joseph Straus Professorship in Law, a chair currently held by Joseph Weiler. More recently, Straus made a gift to establish the Straus Institute for Advanced Study of Law, modeled on an institute at Princeton that served as a haven for Albert Einstein and others

to conduct research. It will receive its first scholars in 2009. "The idea," said Dean Richard Revesz, "is that every year we will welcome the 14 Einsteins of law."

Straus has made these investments not only to honor the past, but for the future—his niece Dori will begin her law studies this fall, "the third generation of Strauses at NYU School of Law," he said proudly. □



ENGAGING IN DIALOGUE Michelle Meertens '98, Dorothy Smith '09, Jenny Rivera '85 and Tulani Thaw '09

The Effect of Gender Plus Race

THE WOMEN OF COLOR COLLECTIVE, a student group begun by Dorothy Smith and Tulani Thaw in 2007, was inspired by a comment in an instant message. "I was sitting in one of my classes, and I was like, 'I just can't take it anymore,'" says Smith. She sent a message to Thaw, who tapped back, "We need a support group."

At issue were Smith and Thaw's feelings that there were pressures on women of color that they couldn't release in the classroom. "We felt that, as women of color, the law school experience can be isolating," Smith says. For instance, "when you are in a classroom reading about a case in which four black youth are shot at in self-defense, you either have a sterile conversation that objectively analyzes the case for the self-defense elements without talking about the obvious racism at play, or you have a shallow dialogue in which either you get to be the black voice, or you say nothing while everyone tries to be politically correct."

Apparently, this experience is mirrored in law firms, too, as the American Bar Association found in 2006 when it commissioned a report on women of color in firms with more than 25 lawyers, concluding that "women of color fare worse than women in general or men of color." It cited a 2005 National Association of Law Placement study that found 81 percent of minority female associates had left their law firms within five years of being hired.

While Smith and Thaw acknowledge that there are already groups for women or for ethnic minorities—in fact, the two are or have been members of the Black Allied Law

Students Association and the Multiracial Law Students Association, respectively—there is no group at the Law School that focuses on both together. "The tendency is for society to make us choose between our race and gender," Thaw says. "This type of binary thinking is exactly what we want to avoid."

Smith and Thaw put their plan into action in the summer of 2007, and the group was officially accepted by the Student Bar Association last November. The heart of their endeavor is simply to provide an opportunity for their members to share their stories and seek advice, but they also aim to educate the student body about issues related to women of color in society and the legal profession. For example, they cosponsored a panel with Law Women and the Battered Women's Project on violence against women of color. They also held an alumnae/student banquet, where guest speaker Jenny Rivera '85, special deputy attorney general for civil rights in the New York State Attorney General's office, discussed the ABA report, highlighting challenges faced by women of color in law firms to get good assignments, have access to clients and networking and move up the career ladder. In 2004, only 17 percent of law partners were women, and only four percent were attorneys of color—of either sex.

"We hope our group can provide a space where women of color can discuss [their unique issues], how to adequately deal with them and then how to refocus," says Thaw. "Our role in law school is first as students, and we want our members to feel they can focus on academics." □



In Praise of Restraint

IN 2001, AS A U.S. ASSISTANT ATTORNEY general, Viet Dinh was instrumental in drafting the USA PATRIOT Act, which lengthened the reach of the president and law enforcement and reduced limitations on intelligence-gathering within our borders. Since then, Dinh has expressed some regret about unintended effects, such as the section of the act that combats international money laundering to fund terrorism. He says prosecutors, given greater authority, have been too quick to limit international businesses in the name of national security. "Like any sword, it has two edges," he said to the *London Sunday Telegraph* in November 2007.

So in speaking at the *Journal of Law & Liberty's* third Friedrich A. von Hayek Lecture in Law last October, Dinh, now a Georgetown Law professor, praised judicial restraint, and pressed international courts to do more by doing less. Dinh argued that they will become more durable global institutions by treading lightly in the affairs of individual nations.

To make his point, Dinh used a domestic example of corporate misbehavior, *Graham v. Allis-Chalmers*, in which the Supreme Court of Delaware ruled in 1963 that the board of directors of Allis-Chalmers Manufacturing had no reason to suspect price-fixing on the part of its employees and thus could not be held liable for the violations. Dinh praised the decision for signaling to corporate directors that the court is watching, but not overreaching.

He contrasted this to a case in which he said a court overstepped. In the 2004 *Case Concerning Avena and Other Mexican Nationals (Mexico v. the United States)*,

the International Court of Justice ruled that the United States was noncompliant with the Vienna Convention for failing to notify Mexican nationals on death row of their right to counsel. (In March 2008, the Supreme Court ruled in *Medellin v. Texas* that international treaties and executive memos are not binding upon state courts until they are enacted into law by Congress, nullifying 51 case reviews prompted by *Avena*.)

Dinh warned that membership in international legal institutions should not be taken for granted. "We who seek to develop and participate in those institutions need to build the case that they do their jobs with a healthy dose of humility and restraint," he said, "and that they take the autonomy, authority and competence of domestic institutions seriously." □

Free Speech at Issue

JUDGES GUIDO CALABRESI, JULIA GIBBONS and Roger Gregory of the U.S. Court of Appeals for the Second, Sixth and Fourth Circuits, respectively, adjudicated the final argument of the 36th Annual Orison S. Marden Moot Court Competition last April.

Alan Lawn '08 and Shaun Van Horn '08, as petitioners, bested Andres Correa '08 and Kelly Graves '08 in the fictitious First Amendment case of *Webber v. Smith*, prepared by Andrew Dulberg '09 and James Miller '09. Lawn won Best Oralist. □



ON THE BENCH AND BEHIND THE SCENES The Moot Court Board organized and hosted its third Immigration Law Moot Court Competition; the University of California at Davis and the University of Louisville competed in the finals. Above, Judges John Walker and Emilio Garza of the U.S. Court of Appeals for the Second and Fifth Circuits, respectively, and George Kazen of the U.S. District Court for the Southern District of Texas were flanked by Moot Court Board members Kathleen Baer-Truer '08 and Lee Turner-Dodge '08, on the left, and Matthew Haggans '08, Kyle Hallstrom '08 and Sima Fried '08.

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Student Scholarship

What Is a Progressive Tax Change?



DAVID KAMIN

Before entering NYU Law, David Kamin worked at the Center on Budget and Policy Priorities, a think tank devoted to analyzing how tax and transfer policy affects low- and middle-income Americans. There, while analyzing and writing about the distributional effects of major tax legislation, he sensed that there was something lacking in the debate about progressivity measures—even as these measures were affecting the course of policy debates. Kamin's note "represents my attempt to push forward the discussion and to better define exactly what we mean when we call a tax change 'progressive' or 'regressive.'"

The following is an abridged version of an April 2008 New York University Law Review note, "What Is a Progressive Tax Change?: Unmasking Hidden Values in Distributional Debates." Kamin graduated Phi Beta Kappa and with highest honors from Swarthmore College in 2002 with a B.A. in economics and political science. He is a Furman Scholar with a full-tuition merit scholarship and is an articles editor of the NYU Law Review. After his expected January 2009 graduation, Kamin will become the special assistant to the director of the Congressional Budget Office in Washington, D.C.

"President Bush's tax cuts have made the tax code more progressive."

—White House press release, July 11, 2006

"[The] Bush tax cuts reduced the progressivity of the federal income tax and the federal tax system in general."

—Report from Democratic staff of the House Ways and Means Committee, April 12, 2005

THESE TWO QUOTES ARE CHARACTERISTIC of a fierce debate about tax equity that has persisted in Washington since the enactment of the first Bush tax cuts in 2001. Tax cuts have been the centerpiece of the Bush Administration's domestic economic policy, and over the last seven years, number crunchers have "followed the money," producing a myriad of distributional analyses showing the effects of the tax law changes by income category. Nonetheless, controversy continues to swirl around whether the Bush tax cuts are, in fact, progressive, shifting the tax system in favor of lower-income Americans, or, instead, regressive, shifting the system in favor of higher-income Americans. Policymakers and Washington analysts, often looking at numbers that are fully consistent with one another, have arrived at opposite conclusions, with opinions tending to fall along party lines. Thus, despite extensive economic analysis, there remains stark disagreement regarding a fundamental question: Are the Bush tax cuts distributionally "progressive," "regressive," or "neutral"?

This controversy is indicative of a more general confusion, both in Washington and in the academic literature, about how to measure the progressivity of a tax change. The confusion is particularly vexing because policymakers and analysts often rely on progressivity as a guidepost when constructing and analyzing policy, but do little to explain or justify the particular progressivity measures they employ. Progressivity measures—which can differ considerably from one another—tend to be haphazardly chosen based on arguments that have rhetorical flair but lack normative substance. Thus, important policies are being developed and evaluated based on distributional measures that may not be meaningful and may, in fact, be misleading.

The academic literature is replete with arguments regarding which measure is best for assessing the progressivity of tax changes, but this debate has largely devolved into empty rhetorical assertions. The

literature fails to explain why any particular progressivity measure is necessarily a better gauge of a tax change's effect on equity.

This note takes an alternative approach. It argues that, if progressivity measures are to accurately gauge how a tax change affects the fairness of the tax system, they must be rooted in a theory of distributive justice that motivates our concern for how the tax system distributes resources. This means that a measure should indicate that a tax change is progressive if the tax change, according to the relevant theory of distributive justice, has meaningfully shifted the tax system in favor of low-income Americans. Where a regressive change is indicated, the opposite should be true, and a neutral tax change, by distributing its benefits or burdens equally across all income levels, should leave the fairness of the tax system unchanged.

THE MEASURES AND HOW THEY DIFFER

A handful of progressivity measures serve as the fodder for Washington tax debates and are used widely throughout the tax literature. The table below uses a simple example to illustrate how five prominent progressivity measures can diverge. These five measures—or ones closely related to them—dominate the debate about tax fairness in Washington and the discourse among many academics.

For the purposes of this example, assume that there are two taxpayers in society: “High” and “Low,” with High earning \$100 and Low earning \$50. Prior to the tax change, High pays \$30 in taxes and Low pays \$10. The tax change involves cutting High's taxes by \$2 and Low's taxes by \$1, reducing revenues by a total of \$3.

Under these circumstances, the five measures do not agree as to whether the tax change is progressive, regressive, or neutral. (Note that the table labels the measures “Measure A,” “Measure B,” and so forth.

These labels are also used later in this note.) On the one hand, Low has seen her tax liability cut by a greater percent than High (Measure A) and, as a result, Low's share of total taxes paid has dropped, while High's share has increased (Measure B). Both these measures indicate that the tax change is progressive. (In fact, Measures A and B are very closely related—always agreeing as to whether a tax change is progressive or regressive.) On the other hand, High's after-tax income has seen a somewhat greater percent increase than Low's after-tax income (Measure D), and High has also received a larger tax cut in dollars (Measure E). Seen through these measures, the tax cut is regressive. And, finally, in terms of percentage point change in average tax rate, the tax cut is perfectly neutral, with both taxpayers having their average tax rates fall by two percentage points (Measure C).

So, how to choose? The literature is split as to which measure is best—and arguments for a given measure have largely failed to probe the normative underpinnings of the concern for progressivity. This note proposes that the answer to this question lies in one's choice of a particular theory of distributive justice.

MEASURES OF PROGRESSIVITY AND THEORIES OF DISTRIBUTIVE JUSTICE

The question of how resources should be fairly or optimally distributed and, in turn, how government should allocate the tax burden among the citizenry has elicited a vast body of literature. The discussion below briefly summarizes how three dominant theories of distributive justice relate to the measures of progressivity that have been introduced here.

EQUALITY OF RESOURCES

Those who concern themselves with equality of resources believe that a reduction in resource inequality is “an end in itself.” If

resource inequality is the scale upon which tax fairness is judged, then a progressive tax change should be one that shifts the tax system more in favor of those with lower incomes by closing the gap between the highest earners and those below them.

Two of the progressivity measures stand out as good measures of a tax change's effect on resource inequality. These measures are percent change in after-tax income (Measure D) and tax change in dollars (Measure E). Percent change in after-tax income (Measure D) defines the extent to which relative income differences shift due to a tax change, while tax change in dollars (Measure E) indicates how a tax change affects the absolute differences in income between different economic classes. But, whether inequality is best measured in relative or absolute terms is a difficult question which can only be answered by a deeper probing of why resource inequality is harmful.

EQUAL SACRIFICE

The equal sacrifice doctrine does not concern itself with the fair distribution of resources but, instead, the fair distribution of tax burdens. This theory posits that fair taxation would require equal sacrifice from all, leaving the distribution of welfare generated by the market unchanged. Three of the measures of progressivity discussed here, percent change in taxes paid (Measure A), percentage point change in share of taxes paid (Measure B), and percent change in after-tax income (Measure D), are plausible measures of progressivity under this theory of fairness. Measures A and B (which, as noted before, are closely related) indicate how a tax change affects relative differences in tax sacrifice, while Measure D serves as a good proxy for changes in the absolute level of sacrifice, assuming that the marginal utility of income descends at a plausible rate as income rises.

A Hypothetical Tax Cut				MEASURES OF PROGRESSIVITY				
MEASURES OF PROGRESSIVITY DIVERGE								
HYPOTHETICAL INCOME AND TAX LIABILITY				A	B	C	D	E
Income Level	Pre-Tax Income	Tax Liability Before Tax Cut	Tax Liability After Tax Cut	Percent Change in Taxes Paid	Percentage Point Change in Share of Taxes Paid	Percentage Point Change in Average Tax Rate	Percent Change in After-Tax Income	Tax Change in Dollars
Low	\$50	\$10	\$9	-10.0%	-0.7%	-2.0%	2.5%	-\$1
High	\$100	\$30	\$28	-6.7%	0.7%	-2.0%	2.9%	-\$2
				PROGRESSIVE	PROGRESSIVE	NEUTRAL	REGRESSIVE	REGRESSIVE

UTILITARIANISM

The utilitarian principle requires that society be organized so as to maximize social welfare as calculated by summing the utility of all members of society. From the utilitarian perspective, the entire progressivity framework, irrespective of the measure employed, should be rejected because it focuses on the wrong issue—namely, which income classes have done better than others, as opposed to whether aggregate utility has been maximized. This does not mean that distributional tables are irrelevant to utilitarianism; in fact, they are quite important for evaluating the optimality of a tax change, since a dollar in the hands of those with lower incomes would be expected to generate more utility than a dollar in the hands of those with higher incomes. But, in employing tax distributional tables, the utilitarian would not be concerned with which income groups have done better than others (or trying to discern what it means to do better)—the *sine qua non* of progressivity. Instead, the utilitarian would be focused solely on maximizing aggregate utility, which is an entirely different issue.

CONCLUSION

This note does not arrive at a determinative conclusion as to which progressivity measure is “best,” instead finding that “it depends.” But, in outlining exactly what this decision depends on, this note moves the discussion forward in a number of ways. First, this note provides a mapping of theories of distributive justice onto progressivity measures, allowing a person to choose which measure of progressivity to use depending on how that person conceives of tax justice. Second, this analysis cautions that the progressivity framework is not necessarily consistent with all theories of distributive justice. In fact, according to one dominant theory of justice—utilitarianism—the progressivity framework is a flawed one. This point highlights the importance of analyzing progressivity measures with a theory of distributive justice in mind and warns against adopting a progressivity framework without understanding how it connects to one’s conception of tax justice. Finally, this note’s approach pushes the debate beyond bald assertions of which progressivity measure is superior. There will still be disagreements about progressivity measures, but these disagreements should be framed in terms of theories of justice. This allows for a richer debate that addresses substantive issues about how fairness should be conceived and offers greater potential for moral progress. □

Student Tax Notes Win Prizes

NYU TAX SCHOLARS HAD PROFITABLE returns in 2007. David Kamin '09 and Michelle Christenson '08 won second place and honorable mention, respectively, in the 2007 Tannenwald Writing Competition, cosponsored by the Tannenwald Foundation for Excellence in Tax Scholarship and by the American College of Tax Counsel. The judges received 50 papers from full- and part-time law school students from around the nation who wrote on any federal or state tax topic. Kamin’s paper (excerpted at left, beginning on page 84), “What’s a Progressive Tax Change? Unmasking Hidden Value of Distributional Debates,” earned him a \$2,500 cash prize.

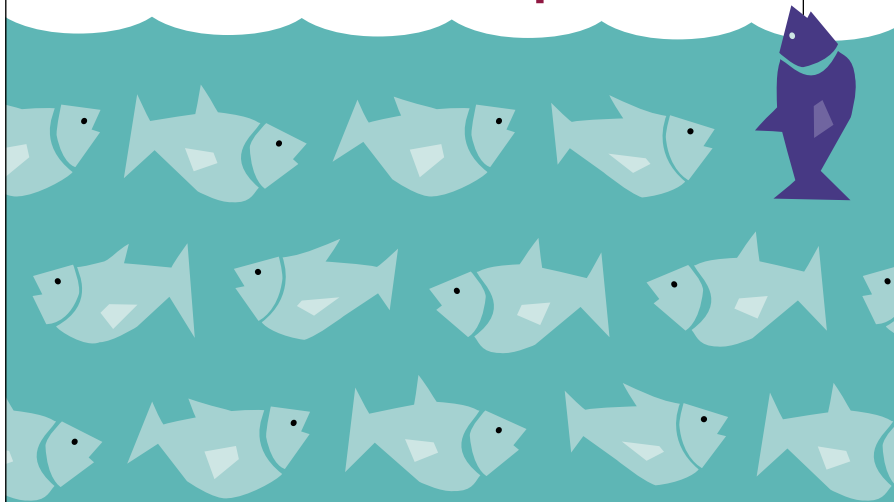
Christenson’s paper, “Optimal Property Taxation: An Endowment Tax on Land Value,” proposes a land value tax as the op-

timal tax base for land holdings; it is more equitable than a property tax, she argues, since it ignores improvements and better reflects what landowners can pay and receive as benefits. Christenson also explores whether a land value tax should be weighted, with a higher tax rate for low-value land use. “It was really useful to discuss—as well as defend—my paper with a group of other students and professors versed in law and economics,” says Christenson.

Kamin is gratified for the opportunity to bring the issue of accurately measuring tax progressivity to a wider audience: “I consider how to measure the progressivity of a tax change to be an important issue. I was very happy to see that I convinced readers that I am proposing a credible approach to this problem.” □



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A Remedy for Victims of Abuse by U.N. Peacekeepers



CATHERINE SWEETSER

Catherine Sweetser '08 wrote two theses on peacekeeping when she was at Yale, where she graduated magna cum laude in 2005 with a B.A. in political science and international studies. Since coming to NYU, she has become fascinated by global administrative law, in particular by how international institutions are accountable to the people they serve and to the governments that create them. This excerpt is from "Ensuring Accountability of Peacekeeping Personnel for Human Rights Violations," which was presented at the 2007 Emerging Human Rights Scholarship Conference. It will be published in the NYU Law Review in November. Sweetser was a Furman Scholar and an articles editor of the NYU Law Review. She is an Institute for International Law and Justice Scholar. She expects to earn a 2009 LL.M. in international legal studies and ultimately plans to teach international and administrative law.

DESPITE AN OFFICIAL "ZERO tolerance" policy and a commitment to international humanitarian law and international human rights, stories of exploitation by United Nations peacekeeping troops and personnel continue to surface. From 2004 to 2006, the U.N. investigated 319 individual peacekeepers for sexual abuse and disciplined 179 soldiers, civilians and police officers. Most recently, BBC investigators uncovered allegations of an assault on a 15-year-old girl in Liberia and of a number of assaults in Haiti. The U.N. has made a genuine effort to reform policy around peacekeeping but has not yet provided compensation to victims. The perceived lack of recourse for victims undercuts the legitimacy of the U.N., thereby weakening peacekeeping efforts, and has distinct ramifications for the immunity

the U.N. currently enjoys as an intergovernmental organization.

The question of legitimacy becomes one of efficacy for the U.N. in situations where missions are attempting to rebuild post-conflict societies and depend on the support of donors as well as of the local population. U.N. officials recognize that individual criminal acts have an effect on the ability of the U.N. to carry out its missions. The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, stated that "[t]he United Nations will [lose]... its moral force if it fails to respond when those within the United Nations system violate human rights."

In this note, I focus on the same group of people that the General Assembly's Group of Legal Experts' recent report targets: peacekeeping personnel. The term "peacekeeping personnel" encompasses officials of the United Nations—both staff and volunteers—and experts performing missions, including United Nations police, military observers, military advisers, military liaison officers and consultants. Troops are often subject to very little if any control by the U.N., raising difficult questions for the responsibility of the U.N. toward violators, but peacekeeping personnel operate as employees of the U.N. and are subject to both functional immunities under the privileges and immunities convention and broader immunities under specific agreements with host states. As such, their behavior reflects most strongly on the organization.

CURRENT PRACTICE AND RESPONSE

The U.N. has responded to problems with peacekeeping personnel through ex ante measures: specifically, encouraging decision making that focuses on women's rights and the disparate impact of measures on women and including "gender units" with teams of troops. It has also taken ex post measures on an ad hoc basis, setting up investigations by the Office of Internal Oversight Services into scandals in the Congo, Liberia, and Haiti, creating Boards of Inquiry under transitional administrations and setting up specific hotlines and complaint procedures for missions. Recent cases have implied that the organizational immunity provided the U.N. is contingent on provision of alternate remedies for people injured. Where there is a gap in the provision of compensation and remedies to victims, the U.N. must fill that gap.

The U.N. has given financial compensation to states and, in cases of arbitrary detention, to individuals in the past, thus potentially recognizing some form of

liability when peacekeeping personnel commit illegal acts. Where a claim is brought against a country or against the U.N. during a military operation, a claims review board may be formed. These ad hoc mechanisms are slow and costly but show that the U.N. already has experience in compensating for claims against peacekeeping personnel.

Such compensation by the U.N. for unlawful acts by U.N. personnel has come on a case-by-case basis and seems largely contingent on international pressure or litigation by the victim's state. It thus does not systematically establish confidence in the U.N. system. It also privileges those victims who have the resources to bring their own lawsuits or who live in a state that has the functional capacity and political will to act on their behalf. The U.N. response will fail to provide an adequate remedy for abuse by employees unless it deploys more systematic ex post mechanisms to ensure financial compensation and civil liability, such as a blanket waiver of civil immunity or a compensation commission.

THE LIABILITY GAP

In order to ensure legitimacy, the U.N. system must be poised to engage with each incident, whether or not the incident rises to the level of an international crime. Although criminal acts by peacekeeping personnel may arguably be said to violate international human rights law through violating an individual's right to life or right to bodily integrity, international law does not provide universal jurisdiction for civil suits in these situations. Individual sexual abuses by peacekeepers are not considered crimes violating peremptory norms, and peacekeepers are currently protected by status-of-forces agreements giving them significant immunities within the country of the mission.

Rape and sexual abuse are increasingly recognized as war crimes and crimes against humanity by international criminal tribunals but the recognition generally requires that the act be part of a widespread or systematic attack against a population, rather than an isolated incident. In crafting a general system that corresponds to all sexual abuse by peacekeepers, U.N. officials cannot assume that all such crimes will fall into the category of crimes against humanity.

Despite the absence of peremptory or international criminal norms against such conduct, peacekeepers may still be violating the human rights of their victims, if non-state actors can be said to be violators of human rights. Commentators have derived a right to bodily integrity from the right to "life, liberty, and security of person" in the

Universal Declaration of Human Rights and the right to life under the International Covenant on Civil and Political Rights. The fact that such a violation does not rise to the level of jus cogens norms generating universal jurisdiction, and probably will not fall under the rubric of international criminal law, means that the U.N. must take positive steps to ensure that victims have a forum in which to file complaints and bring claims.

The current structure of immunities creates gaps in liability and adds to the climate of impunity. Although international human rights law often relies on domestic legal systems for enforcement, functional immunities attach to U.N. personnel while on mission. Even when alleged violations fall outside a peacekeeper's given function, domestic courts on the ground may require a waiver of immunity before a suit can be brought. The International Court of Justice has held that the Secretary-General has a pivotal role to play in determining whether immunity attaches. The power of the Secretary-General to refuse to waive immunity in the face of a serious crime thus hinges on the question of whether a human rights violation can constitute an official act of the U.N. or whether the protection of a violator can be functionally necessary for the operation of the U.N.

Part of the power of the Secretary-General to refuse to waive immunity comes from countervailing human rights considerations of due process for alleged perpetrators. Due process protections are much stronger in the civil context; during a subsequent enforcement action, the courts of the peacekeepers' home nation can examine the fairness of the original action in the host country. Nonetheless, for practical reasons, a waiver of immunity may not fill the liability gap: Many individuals will not have the resources to pay judgments against them; most victims will not have the resources to bring complicated suits and subsequent enforcement proceedings; and in a country undergoing or in the aftermath of serious armed conflict, the courts may not yet be equipped to hear claims.

FILLING THE GAP

The U.N. is currently taking action to fill in the enforcement gap left in criminal law, but there is no system in place to fill in the gap in civil law. The General Assembly's Group of Legal Experts has created a draft convention to ensure that states exercise criminal jurisdiction over their own nationals, but it has purposely avoided altering the structure of immunities. A referral "to medical and psychosocial services available in the host

country, with costs to be covered from existing mission budgets," is the only current remedy available to victims. This remedy clearly falls far short of true compensation, particularly because medical and psychosocial services may simply not be widely available in post-conflict situations.

The U.N. should implement a default policy of waiving civil immunity for serious crimes and gross human rights violations. However, there are practical reasons such a waiver may not be sufficient. In some cases, a waiver might impair the efficacy of the mission; in others, victims may not be able to bring suits. Thus, where immunity applies, the U.N. should also create an alternative forum, such as a compensation commission, for victims to file complaints.

The trust fund of the International Criminal Court (ICC), which will soon be formed and administered, provides a good potential model for a compensation mechanism in the peacekeeping context. The U.N. should follow the model of the ICC and create a trust fund from which to compensate victims and should tie it to existing complaint and investigatory mechanisms. This fund should also be part of the peacekeeping budget since voluntary funds such as the U.N. Voluntary Fund for Victims of Torture have struggled for funding.

CONCLUSION

Although financial compensation cannot truly restore a survivor of abuse to his or her former state, it can make a crucial difference. A 2005 report by Prince Zeid, special adviser to the Secretary-General, proposing a voluntary fund, points out that "[m]any victims, especially those who have 'peacekeeper babies' and who have been abandoned by the fathers, are in a desperate financial situation." In addition to child support, compensation can be important for those who have contracted HIV/AIDS and who will need long-term health care. A compensation commission or mechanism would not only provide a useful alternative forum for victims, thus enabling a principled denial of waiver of immunity in domestic courts should due process concerns arise, but could also ensure recognition of and concern for victims by the U.N. itself, restoring legitimacy to the organization in the eyes of the public. The steps taken thus far by the U.N. to provide for criminal jurisdiction in the country of nationality and to strengthen complaints and investigatory procedures will prove crucial; yet in the course of reform, the U.N. should not forget to provide compensation to victims who have no access to a civil suit. □



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United Nations Secretary-General Ban Ki-Moon gave the keynote at the Global Colloquium of University Presidents held at the Law School last November. President Bill Clinton also spoke at the two-day event, which included 50 university presidents and faculty experts and focused on the university's role in shaping climate change policy in the post-Kyoto era.

European Central Bank President Discusses Downturn at Policy Forum

THE LAST EIGHTEEN MONTHS HAVE not been kind to the U.S. economy. The collapse of American subprime asset-backed securities have left housing numbers weak and financial institutions continuing asset write-downs; the economic future remains uncertain.

Prominent domestic and global policy makers who participated in the NYU School of Law's second annual Global Economic Policy Forum (GEPF) on April 14

Domestic panel speakers included Donald Marron, senior economic adviser on the President's Council of Economic Advisers; Tevi Troy, deputy secretary of the U.S. Department of Health and Human Services, and Kevin Warsh, member of the Board of Governors of the Federal Reserve System.

Warsh and Marron cited actions that the Federal Reserve and the Bush administration have taken to ameliorate volatile credit and financial markets and boost the sluggish U.S. economy. However,

they said it would take time for these policies to become effective. For example, the Federal Reserve had cut interest rates by three and a quarter percentage points between September 2007 and May 2008, and it has offered banks hundreds of billions of dollars in liquidity to keep their credit flowing. The U.S. government passed a \$150 billion fiscal stimulus plan in February, which provided tax incentives to encourage businesses to spend, as well as stimulus checks ranging from \$300 to \$1200 per household, mailed in late April. Marron said he expects these two moves to add 500,000 to 600,000 jobs

to the economy, but not until the end of 2008. "People sometimes forget how quickly we've reacted, given some of the delays that are involved," Marron said.

Most importantly, it will take time for the full impact of the Fed's rate cuts to be felt, Marron said. Fed studies show that it takes a year after rate cuts are implemented for half of their effects to be felt in the economy. Therefore, he said, the Fed's rate cuts from the past several months should make a noticeable difference in the economy during the second half of this year and the start of 2009. Though not back up to speed yet, credit markets have already shown "early, encouraging signs of repair," Warsh asserted. "Our tools are incredibly powerful, but they don't work overnight."

In the immediate aftermath of the rate cuts, however, high oil and other commodity prices have made consumer prices higher, causing inflation concern in recent months. Until credit markets regain their stability, more financial shocks could take place in the near future as companies continue to write-down overvalued assets, Warsh said. Already, the collapse of the subprime mortgage market has caused about \$245 billion in asset write-downs and related credit losses.

Of course, write-downs in the subprime housing and related credit markets have negatively affected more than just the U.S. economy and credit market. Global financial markets also face a "situation of high uncertainty," said European Central Bank President Trichet in his keynote speech following the domestic policy session.

Trichet referred to the recommendations from the April 11 Group of Seven Nations Conference, which called for more industry oversight and transparency, saying that financial institutions should immediately disclose the extent of their losses. He also noted the need for continued cooperation among the world's central banks, as well as greater regulatory oversight of the financial industry. "The present turbulences have, once more, demonstrated that opacity as regards markets, financial instruments and real situations of financial institutions is a recipe for catastrophe," Trichet said.

Buoyed by an abundance of liquidity and profits, as well as the creation of increasingly sophisticated financial products, the beginnings of the current financial crisis began well before last August, when signs of U.S. mortgage related troubles began to show, Trichet said. At that time, market participants operated under the false assumption that asset prices would continue to climb indefinitely. "The much higher degree of contagion that followed stemmed from and was reinforced by [these] factors," Trichet said.

Trichet commended U.S. Treasury Secretary Henry Paulson's recent proposal to overhaul the American financial system's structure, but said any solution to the current financial crisis must involve the commitment of many countries together. "The present turbulences are a global phenomenon," Trichet said. "Only a global response can be effective." □ *Kelly Nolan*



Jean-Claude Trichet



Tevi Troy



Kevin Warsh



Donald Marron

addressed the worldwide effects of the downturn. Jean-Claude Trichet, president of the European Central Bank, gave the keynote address with a decidedly international focus, expressing concern about wobbling global markets and emphasizing that only an immediate, global response could revive them.

The GEPF program, cochaired by Stuyvesant P. Comfort Professor of Law Geoffrey Miller, director of the Center for the Study of Central Banks, and Adjunct Professor Alan N. Rechtschaffen, was split into two sessions. In the first, participants discussed domestic policies, and, in the other, international responses to the ongoing turmoil in the U.S. economy and its reverberations in world financial markets.



JOLLY GOOD FELLOWS At the Hays anniversary gathering, faculty directors Helen Hershkoff, Norman Dorsen and Sylvia Law; Justice Ruth Bader Ginsburg; Anna Deavere Smith



Hays Celebrates 50th; Ginsburg Gives Keynote

"WE ARE JUST ENTERING HEAVY duty time at the Court, with decisions in over half of the term's cases still to be released before the summer recess," said U.S. Supreme Court Justice Ruth Bader Ginsburg, beginning her keynote address at the Arthur Garfield Hays Civil Liberties Program's 50th anniversary celebration dinner in May. Even so, she said, she "could hardly resist" the invitation to speak. "I applaud the efforts of [Hays] Fellows past and present to play a meaningful part in repairing tears in our communities, country and world."

It made sense that Ginsburg—first in her class at Columbia Law, first woman to serve on both the *Harvard Law Review* and the *Columbia Law Review*, first director of the American Civil Liberties Union Women's Rights Project, and first Jewish woman on the Supreme Court—would speak at a dinner celebrating the Hays Program. After all, the Hays, founded at the Law School in 1958 in honor of pioneering civil liberties lawyer Arthur Garfield Hays, was the first program focused on training law students for public service, and remains the foremost one. The program has taken the lead in addressing pressing constitutional issues, whether those were free speech and church-and-state issues in the 1950s and 1960s; gender discrimination cases and the Vietnam War's implications in the 1960s and 1970s;

gay, lesbian and transgendered rights in the 1980s and 1990s, and, most recently, immigration and executive-power issues.

Each year, the Hays Program awards fellowships to a select group of 3Ls to pursue civil liberties work, either with outside organizations or through research and special projects guided by one of the program's faculty directors. The current directors are Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law and director since 1961; Sylvia Law '68, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, herself a Hays Fellow, and Helen Hershkoff, Anne and Joel Ehrenkranz Professor of Law. Hays directors and fellows also work on litigation, produce scholarship and hold conferences.

The Hays Program marked its milestone with an all-day program that, aside from the dinner, included a luncheon and two panels, one on issues arising from challenging clients and the other concerning shifting positions on civil liberties issues. In a testament to the Hays Fellows' ongoing dedication, about 45 percent of the program's 263 living alumni participated. Honored at the dinner were Professors Donald Wollett (now 89) and the late Paul Oberst, the first Hays directors from 1958 to

1960, and Evelyn Palmquist, longtime assistant to the program.

In her keynote, Ginsburg discussed important civil liberties cases in the current Supreme Court term, including *Baze v. Rees*, which upheld the constitutionality of Kentucky's method of lethal injection in death penalty cases; *Riegel v. Medtronic, Inc.*, which held that Food and Drug Administration approval of a medical device exempted manufacturers from common-law tort claims, and *Crawford v. Marion County Election Board*, which left in place a law requiring Indiana voters to show photo identification. Ginsburg explained the reasoning of her dissents in all those cases.

University Professor and playwright Anna Deavere Smith ended the evening on a powerful note, performing several pieces on human dignity. These included excerpts from Representative Barbara Jordan's 1974 commencement address at Howard University on the erosion of civil liberties, and the words of a doctor at a New Orleans hospital in Hurricane Katrina's aftermath. Smith's final piece came from an interview she conducted with Studs Terkel, whose observations on the loss of "the human touch" in public life, combined with Smith's delivery, prompted a resounding ovation. "In celebrating you," Smith said, "I wanted to celebrate the language of law and those of you who uphold that language and the law." □ *Atticus Gannaway*



DOCUMENTING 50 YEARS
A 400-page book by Norman Dorsen chronicles the Hays Program's history.

A Green Agenda for the Next U.S. President

Legal scholars, economists, policymakers, and a leading climate change scientist met at NYU to discuss various solutions to a logjam of global proportions.



NOT SINCE 1990 HAS A NEW ENVIRONMENTAL statute been passed in this country. Additionally, of those statutes that are decades old, such as the Clean Air Act of 1970, many aren't being fully implemented or enforced. The upcoming election offers an opportunity to break the impasse. So in March, NYU Professors Richard Stewart and Katrina Wyman and New York Law School Professor David Schoenbrod joined with the *NYU Environmental Law Journal* to present the symposium, "Breaking the Logjam: An Environmental Law for the 21st Century." During the two-day event attended by 300, environmental legal scholars, economists, researchers, policymakers and a leading climate change scientist assessed the state of U.S. environmental policy and debated the direction policy should take under the next administration. The discussion focused not only on national policy, but also on how to strengthen international policies in 2012, when the Kyoto Protocol Treaty ends.

Not surprisingly, climate change issues dominated. "The overwhelming priority that will crowd out others is climate change," said keynote speaker Phil Sharp, president of Resources for the Future, a Washington, D.C.-based nonprofit environmental and energy research organization. He pointed out that already this issue is on the national agenda, citing the

widely publicized 2007 reports by the Intergovernmental Panel on Climate Change (IPCC) and the Supreme Court case *Massachusetts v. EPA* in which the Court ruled that the EPA is in charge of regulating carbon dioxide and other greenhouse gas emissions from motor vehicles. However, Sharp noted that the "diversity of viewpoints" on the issue of how best to confront climate change will make political compromises difficult. The two challenges facing the incoming administration will be creating national legislation and negotiating collective, global agreements.

Other than the U.S., which emitted over 6 billion tons of greenhouse gases in 2004, the three countries that are the biggest polluters are Brazil, China and India. But even if one of these countries drastically reduces its greenhouse gas emissions, it still will be affected by the greenhouse gases spewed by other nations. Recent scientific research shows that aerosols, or small particulate matter, thrown up into the air in Asia are reaching as far east as the Rocky Mountains in the U.S. In fact, this may be the first national problem that cannot be resolved with unilateral action. "Climate change is really the first major example of a problem [to be] dealt with internationally," said E. Donald Elliott, chair of the worldwide Environmental, Health and Safety Department at Willkie Farr & Gallagher LLP.

So how can the next administration convince the Big Three (as well as the U.S.) to tackle this problem multilaterally? While some conference participants proposed building new international coalitions, as well as continuing to take part in existing organizations, the general consensus was that a greenhouse gas cap-and-trade system is the most promising environmental legislation in the near future.

Cap-and-trade works by placing a price tag on pollution: Each company is given permits for releasing a certain amount of pollution, but companies are free to buy and sell those permits. Currently, several nations, including many in the European Union, and several states in the U.S. have established cap-and-trade protocols, but a global system has yet to be established.

Still, Princeton Professor of Geosciences and International Affairs Michael Oppenheimer, who is a climate change scientist and a lead author of an IPCC report, argued that nations need to take additional, bolder measures—a prospect some participants deemed unlikely. "China will not eliminate coal and CO₂ emissions," said Andrew

Morriss, H. Ross and Helen Workman

Professor of Law and Business at the University of Illinois College of Law.

It wants "to stay in power with rapid economic growth." When America sees that, he added, it won't endorse radical change, either.

Others, though, pointed out that the adoption of tougher state laws could cause a domino effect. "I would suggest that working within our state boundaries is working internationally," said Peter Lehner, executive director of the Natural Resources Defense Council, in his luncheon speech. "State action will pressure the federal government," agreed David T. Buente Jr., a partner at Sidley Austin LLP, where he heads the environmental practice. And once Capitol Hill follows the states' lead, the U.S. can pressure other nations to follow suit. What's clear is that the status quo—in the U.S. and abroad—is no longer acceptable, participants said.

Update: In a meeting in early July in Washington, D.C., conference organizers Stewart and Schoenbrod discussed the project recommendations from this symposium with the top environmental advisers to presidential candidates, Senator John McCain and Senator Barack Obama. "Each was very receptive and encouraging," said Stewart. He, Wyman and Schoenbrod also are preparing a report detailing the proposals and plan to release it in November, in advance of the new Congress and administration. □ *Molly Webster*





Then-Senator Cristina Fernández de Kirchner

Argentina's Señora Presidenta Talks of Justice Delayed

ONE MONTH BEFORE ARGENTINA'S first lady, Senator Cristina Fernández de Kirchner, became the first woman elected president of Argentina, she took part in the Emilio Mignone Lecture on Transitional Justice. The discussion centered on Argentina's attempts to prosecute military officers who ordered kidnappings of people during the "Dirty War" of the 1970s and '80s.

Kirchner was joined by Judge Baltasar Garzón of Spain's High Criminal Court and Juan Méndez, president of the International Center for Transitional Justice, which cosponsored the event with the Law School and the Center for Human Rights and Global Justice (CHRGJ).

Kirchner made a case for Argentina's efforts to address past human rights violations. She recalled how her husband, President Néstor Kirchner, strongly suggested that the Argentine congress eliminate impunity laws established during the mid-1980s, which set unreasonable limits on victims who wished to file charges for crimes committed during the "Dirty War" and absolved army officers of their participation in torture and murder.

There was dramatic tension to the discussion as moderator Méndez was himself kidnapped and tortured just prior to Argentina's first military coup of President Isabel Perón. In 1975, when he was an attorney representing political prisoners, he

was arrested, then interrogated, stripped naked, beaten and electrocuted during his year-long detention.

"Knowing what happened to those who disappeared and obtaining the truth is a debt we still owe to the family members of those who were kidnapped," Kirchner said regarding the thousands of Argentines who were seized and are, in many cases, still missing more than 30 years later. Kirchner added that justice for these disappearances must ultimately be meted out by the Argentine judiciary.

Garzón, too, has played a significant role in bringing many of the perpetrators to justice. On July 25, 2003, he requested the extradition of 46 military officials to Spain who were involved with the disappearances of Spanish citizens. The very next day, President Kirchner lifted an executive order that prohibited such extraditions of Argentine military officers to foreign countries. Garzón commended Argentina's swift reaction to his extradition requests, and contrasted it with the "schizophrenic" response he received from Chile's executive and judicial branches during his 1998 move to extradite General Augusto Pinochet for his human rights crimes.

Philip Alston, John Norton Pomeroy Professor of Law and a director of CHRGJ, applauded Argentina for not only diligently seeking justice, but also for its social and economic progress after a troubled past. "The subject of disappearances is regrettable, but it is, in a happier way, associated with the history of Argentina," Alston said. "Happy in the sense that Argentina was able to respond to that curse and has demonstrated to the world the steps that can be taken after such an era of darkness." □

Developing Nations Have a Say in Global Policy

LAUNCHED IN 2004, THE INSTITUTE FOR International Law and Justice's Project on Global Administrative Law (GAL), is credited with encouraging scholars to examine administrative procedures that affect the accountability of global bodies. However, founders and Professors Benedict Kingsbury and Richard Stewart recognized that this emphasis has drawn criticism in the developing world; some say GAL's strong Euro-American focus on imparting legitimacy to structures of global governance has diminished its potential effectiveness. Last January, in a two-day conference in New Delhi, NYU's GAL Project, in collaboration with the Centre for Policy Research in India, brought together 35 scholars to explore this issue. Attendees agreed that the procedural

approach improves institutional accountability at the international level, and promotes administrative due process at the domestic level. Many felt that the presentations helped advance thinking on how to improve regulators' ability to protect public interests in India's various economic sectors. The general consensus also was that GAL hasn't adequately addressed significant concerns of developing nations, such as power disparities. Attendees discussed ways to extend the GAL Project's scope so as to avoid legitimizing



Richard Stewart



Benedict Kingsbury

institutions that serve to perpetuate the power imbalance between developing and developed nations. This also helped set the agenda for future conferences on South Africa and on climate change. □

Outsourcing U.S. Defense

WHEN WAR IS A BUSINESS, SUPPLY and demand become a driving force. Journalists, lawyers and executives gathered this spring at NYU's Center on Law and Security to debate the pros and cons of this trend. In the half-day conference, "Privatizing

like the September 2007 shooting in Ni-sour Square, Baghdad, for which privatized security became notorious. As *Nation* contributor Jeremy Scahill put it, "[The demand for private contractors] is born of an unquenchable thirst for wars of aggression." Legislation, like the Stop Outsourcing

"No, Mr. Hammond," responded Scahill, "it is an enforcement-free zone."

Contractors' lack of accountability may be inherent to being part of the private sector. "The oath matters," said Paul Verkuil, a professor at the Benjamin N. Cardozo School of Law. While contracts in the private sector emphasize efficiency, they ignore accountability. On the other hand, Verkuil said, "public sector values include the accountability that any government employee swears him- or herself into when taking an oath of public service....Certain duties cannot be performed by the private sector, [and this includes] war."

Accountability or not, said Hammond, the violence perpetrated by private contractors in Iraq reveals less about the environment of the private sector than it does the environment of a combat zone.

Verkuil ended the discussion on a more hopeful, if idealistic, note. "It is impossible to outsource sovereignty in the American system because the people own sovereignty," he observed.

Furthermore, with only 6,000 of the 180,000 contractors in Iraq assigned to security, Verkuil also asked an important question: Why can't we hold them to the same oath that all government employees are required to take? □



Stephen Holmes and Nir Rosen



Marty Strong

Defense: Blackwater, Contractors and American Security," the panelists reached a consensus: As long as defense is a demand-based industry, private contractors will be in large supply.

For some speakers, like Marty Strong, vice president of Blackwater USA, or David Hammond, his lawyer, this is a positive statement, suggesting more profits. For others, it conjures up images of violence,

Security Act, "is worthless as long as corporate profits are tied to war," he added.

Blackwater USA and its counterparts see the violent acts in Iraq as the inevitable byproducts of working in a war zone. Nonetheless, Hammond stressed, "This is not an oversight-free zone." Scahill and Nir Rosen, a fellow at the Center on Law and Security, countered that contractors who commit crimes should be prosecuted.

With a Little Help from His Friends

Six weeks after signing a 99-year lease for the World Trade Center, Larry Silverstein, president and CEO of Silverstein Properties, found himself paying \$120 million in annual rent for a vast pile of smoldering rubble. To overcome the seemingly insurmountable obstacles in trying to rebuild, he relied on a few NYU School of Law alumni, as he explained in a talk to students last fall hosted by the Pollack Center for Law & Business.

Silverstein's legal saviors were two of the founding partners of Wachtell, Lipton, Rosen & Katz: Herb Wachtell '54, Silverstein's close friend for nearly six decades, as well as Martin Lipton '55, with whom Silverstein had served for years on NYU's Board of Trustees. "I got on the phone with Herb and I said, 'Herb, I've got a problem.' He said, 'Ha! Do you have a problem!'" Silverstein's insurance coverage of the World Trade Center site, cobbled together with policies from 25 insurers, totaled \$3.5 billion, much less than needed.

It was here that the worlds of real estate development, insurance and law converged: "[Wachtell and Lipton] came up with this concept of two events. Why? Because you had two separate planes hitting two separate towers at different times, and therefore we were entitled to \$7 billion, not \$3.5 billion."

For the better part of six years, Silverstein's litigation against his insurers moved through the courts. It finally took the intervention of both New York State Insurance Department Superintendent Eric Dinallo '90 and then-Governor Eliot Spitzer to broker a deal in 2007. Meanwhile, Silverstein also sparred with the Port Authority of New York and New Jersey, which owned the land at Ground Zero, and the Lower Manhattan Development Corporation, whose



development plans for the site clashed with Silverstein's. His pride in the outcome was clear. Describing the safety measures undertaken in rebuilding 7 World Trade Center, he said, "What we decided to do was to take everything we learned on 9/11 about how not to build a high-rise office building and put those lessons into the design of 7.... It's the best damn building built in America by a huge standard."

Experts Debate Terrorist Threat

WITH NO TERRORIST ATTACKS ON U.S. soil in the seven years since 9/11, a great debate has formed in the intelligence community regarding the threat that al-Qaeda poses. On one side are those who believe al-Qaeda continues to pose a powerful threat, as evidenced by a resurgence of its presence in Pakistan. On the other are those who argue that radicalized individuals and small independent groups who congregate on the Internet and in their neighborhoods have usurped terrorist organizations such as al-Qaeda. This clash was one focus of the Center on Law and Security's fifth annual Global Security Forum last May at NYU's La Pietra campus in Italy.

A core group of lawyers, terrorism experts, policymakers, law enforcement

officials and journalists, mostly from the U.S. and Europe, convened to discuss how to counteract terrorism, as they have every year since the Center on Law and Security (CLS) was founded in 2003. Participants included Yosri Fouda, chief investigative correspondent and executive producer at Al Jazeera, and Armando Spataro, deputy chief prosecutor in Milan. They were joined by Admiral William Fallon, whose off-the-record keynote speech was his first appearance since retiring after 40 years of service with the U.S. Navy. His last assignment had been as commander of the U.S. Central Command, overseeing U.S. military operations in the Middle East, the Horn of Africa and Central Asia.

The group held off-the-record discussions on the future of transatlantic

cooperation; the "Iraq Effect," or how the war has affected terrorists in the broader Middle East, and foreign policy in the next administration. But it was the debate over al-Qaeda and the "state of the threat" that stirred the most impassioned disagreement, even spilling onto the pages of *The New York Times*.

One attendee, Baltasar Garzón, Spain's anti-terror investigatory magistrate and former distinguished fellow of the Center on Law and Security, struck a cautionary note in the *Times*: "The danger of this 'either-or' argument could lead us to the mistakes of the past. In the '90s, we saw atomized cells as everything, and then al-Qaeda came along. And now we look at al-Qaeda and say it's no longer the threat. We're making the same mistake again." □

CLS CONVERSATIONS 1 NPR correspondent Dina Temple-Raston and 2 *New Yorker* writer and CLS Fellow Lawrence Wright at "Prosecuting Terrorism" 3 Carnegie Endowment for International Peace's Karim Sadjadpour and Council on Foreign Relations' Steven Simon at "Fever Pitch: The United States and Iran"; 4 Wright and National Security Network president Rand Beers at "Today's Terror Threat"; 5 *Washington Post* reporter Walter Pincus, CLS executive director Karen J. Greenberg, *Washington Post* reporter Dana Priest and *New York Times* reporter Tim Weiner at "Intelligence in the Age of National Security"; 6 Princeton professor Sean Wilentz and Ted Sorensen, former special counsel to John F. Kennedy, at "State of the Party: Democrats at a Crossroads"; 7 Judge Baltasar Garzón and Professor Stephen Holmes at "Prosecuting Terrorism" event



Scars and Stripes

BY KAREN J. GREENBERG

This essay is an excerpt from a May 31, 2008 article in the Financial Times.

IN APRIL 2004, “60 MINUTES” AIRED A NOW infamous set of photographs depicting torture at Abu Ghraib prison in Iraq. Images of US servicemen and women taunting prisoners with leashes and dogs, and of a hooded man connected to electrodes, overnight brought the word torture into present-day consciousness.

Later, a Department of Defense paper, the Taguba Report, catalogued countless instances of prisoner mistreatment at Abu Ghraib. The photos, it seemed, hinted at just a small part of a larger policy of coercive interrogation.

Since then, investigations and rebuttals have created two battling narratives over this issue, between law and action.

The law is clear. In the US torture—defined as an act intended to inflict severe physical or mental pain or suffering—is illegal. Under international law, it is also illegal.

How has the world’s leading democracy, a model for the ideal that power and decency reinforce one another, become the place where torture is debated rather than outlawed? Freedom of Information Act suits, government leaks and tireless reporting have yielded information about the chronology, the prime architects and the politically approved abuses that have occurred in the “war on terror.” In the run-up to the presidential election and a new administration, several new books document, explain and contextualise the story of US torture.

The most accessible of these focuses on the pragmatic details. In *Torture Team: Deception, Cruelty and the Compromise of Law*, British barrister Philippe Sands uses interviews and documents to portray what occurred in the White House—and shows that it did so because government lawyers at the highest levels enabled it to happen.

The small team included Cheney’s lawyer David Addington, Rumsfeld’s undersecretary of defense for policy Douglas Feith, William Haynes, general counsel at the Department of Defense, Alberto Gonzales at the White House, Jay Bybee, head of the Office of Legal Counsel (the legal arm of the executive branch) and his deputy John Yoo. Together, they penned memos that redrafted existing law to prepare the ground for “coercive interrogation.”

A lawyer by trade, as well as an excellent reporter, Sands documents the discussions that led to the memo written by William “Jim” Haynes and approved by Donald Rumsfeld on December 2, 2002. The memo’s greatest import lies in its “request for approval of counterresistance techniques to aid in the interrogation of detainees at Guantánamo Bay.”

Attached was a list of 18 “counter-resistance” interrogation techniques. Rumsfeld made most policy. According to FBI analysis at the time, 10 of the 18 violated US law, including “hooding, twenty-hour interrogations, the removal of clothing, stress positions and dogs.” The administration says they do not constitute torture; Sands disagrees.

Under these new measures, Mohammed Al-Qahtani, a young Saudi in custody at Guantánamo, was isolated for more than 160 days and subjected to coercive interrogation. This reduced him to a state of disarray documented in FBI logs. *Torture Team’s* purpose is not solely to ascribe blame, however. Sands’ other goal is to consider redress for these crimes. To Sands’ incomprehension, those lawyers who disagreed with Bush on the grounds of the rule of law—among them judge advocate generals and general counsels to the armed services—were excluded from the decision-making process.

This is not, of course, the first time that a modern state power has used bureaucratic radicalism to subvert the law. Hannah Arendt pointed to this, for example, when she wrote *Eichmann in Jerusalem* (1963), about the postwar trial of the Nazi Adolf Eichmann. For Arendt, the banality of evil was rooted in the way the bureaucracy itself, rather than some overarching evil genius, allowed laws to be pushed aside by the human proclivity to follow orders.

In *Torture and Democracy*, Darius Rejali, professor of political science at Reed College, Oregon, begins where Sands leaves off. Documenting modern torture techniques to consider the larger philosophical context, his book is both horrifying and compelling. Like Arendt, he focuses on the systems that produce and implement torture policies. Like Sands, Rejali sees banal professionalism as key to the rise of government torture, which he argues has increased since the 1970s. Citing the case of France in 1950s Algeria, Rejali concludes that “democratic institutions were unwilling or unable to stop the turn to torture.”

Rejali argues that torture fails when it’s needed most—in last-minute, ticking

bomb scenarios. “Torture would work well when organisations remain coherent and well integrated, have highly professional interrogators available.” The case of Algeria seems superficially to defy this analysis, and has often been cited when discussing US torture. The Pentagon helped popularise this comparison when it publicised its own screenings of *The Battle of Algiers* in 2003. The film documents the use of torture to elicit information about the rebels. Bush last year also revealed that he was reading a book on Algeria, *A Savage War of Peace*.

In *Torture and the Twilight of Empire*, Marnia Lazreg, professor of sociology at Hunter College, again uses French torture in Algeria as a window on to a panoply of issues. Among them are gender politics as evidenced in “the sexual core of torture” practised by the French and the National Liberation Front, and the role of decolonisation. Lazreg’s analysis includes one of Sands’ and Rejali’s essential points: the attack on civilian institutions as a means to a political end. On November 13, 2001, Bush signed a military order giving the Pentagon civilian leadership authority over military commissions. The Department of Justice and the uniformed military were sidelined. As Lazreg notes of the militarisation of French government in Algeria, the “transfer of power from civil to military court” started the repression that was to follow.

Sands, Rejali and Lazreg agree that torture is a sign of a political order that has rejected the standards and practices of democracy’s revered institutions, notably in the realm of the law. The more we know about torture, the less we can understand how a civil society can choose to implement it. Perhaps this is why Americans remain stymied by the question of accountability for torture. The need to ascribe responsibility underlies all three books.

Meanwhile, the quagmire over torture persists. No amount of reasoning—not that based on domestic law, international law or security concerns about alienating informants—seems to deter the current administration from its insistence that these “practices” work. Perhaps the only possible response can be to suggest that, all other reasons aside—legal, political, strategic—it is a moral wrong. It is soul-wounding for those who do it—and, we may surmise, for those in whose name it is done.

Karen J. Greenberg is the executive director of the Center on Law and Security at the NYU School of Law and coeditor of *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005).



Should Laws Be Moral?

Eight leading scholars from around the world revisit a 50-year-old debate between H.L.A. Hart and Lon Fuller.



Standing: *NYU Law Review's* Dimitri Portnoi, Liam Murphy, Frederick Schauer, Jules Coleman, *Law Review's* Ben Kingsley, Leslie Green, Nicola Lacey, David Dyzenhaus. Seated: Jeremy Waldron and Benjamin Zipursky.

ON APRIL 30, 1957, THE ENGLISH LEGAL philosopher H.L.A. Hart gave the Oliver Wendell Holmes lecture at Harvard Law School. His topic, he later wrote, “was, and was intended to be, provocative.” Hart called his lecture “Positivism and the Separation of Law and Morals,” and his central point was that there is no necessary connection between law and morality.

Lon Fuller, a law professor at Harvard, found that assertion infuriating. He paced “back and forth at the back of the lecture hall like a hungry lion,” a colleague recalled, and he left during the question-and-answer session afterward, unable to bear any more.

When the *Harvard Law Review* announced plans to publish Hart’s lecture in February 1958, Fuller demanded a reply, one insisting that law is not a neutral concept but one necessarily embodying an inner morality. What the Nazi courts applied, for instance, was not entitled to be called law, Fuller said. “The two articles quickly became, and still remain, the standard scholarly reference point and teaching resource for the opposition between legal positivism and natural law theory,” Nicola Lacey wrote in her 2004 biography of Hart. The Hart-Fuller debate, as it came to be known, continues to resonate and deepen.

Almost exactly 50 years later, on a rainy Friday in February, eight leading scholars from around the world gathered for two days to revisit the debate, which had taken place in the shadow of the Second World War and the Nuremberg Trials. There were

newer shadows now, cast by Guantánamo Bay and questions about the rule of law in the age of terror.

The conference was organized by Jeremy Waldron, University Professor at New York University School of Law, and Benjamin Zipursky, James Quinn Professor of Law at Fordham Law School, and sponsored by the *NYU Law Review*. In a series of papers of extraordinary depth and sophistication, the conference addressed the substance of the debate. But there were also distinct echoes of the original confrontation, building from cool analysis to a crescendo of insistent feeling in Waldron’s final remarks.

On the first day of the conference, Leslie Green, professor of philosophy of law at Oxford University; Jules Coleman, Wesley Newcomb Hohfeld Professor of Jurisprudence and professor of philosophy at Yale Law School; Liam Murphy, vice dean and Herbert Peterfreund Professor of Law and Philosophy at NYU; Frederick Schauer, Frank Stanton Professor of the First Amendment at the Kennedy School at Harvard University, and Professor Zipursky focused for the most part, as Coleman put it, on “the philosophically interesting relationships between law and morality.”

The next day, David Dyzenhaus, professor of law and philosophy at the University of Toronto, took a fresh look at “the case of the grudge informer,” one that had divided Hart and Fuller. It involved a woman who was having an affair and wished to be rid of her husband. She accomplished that by denouncing him for insulting Hitler in 1944.

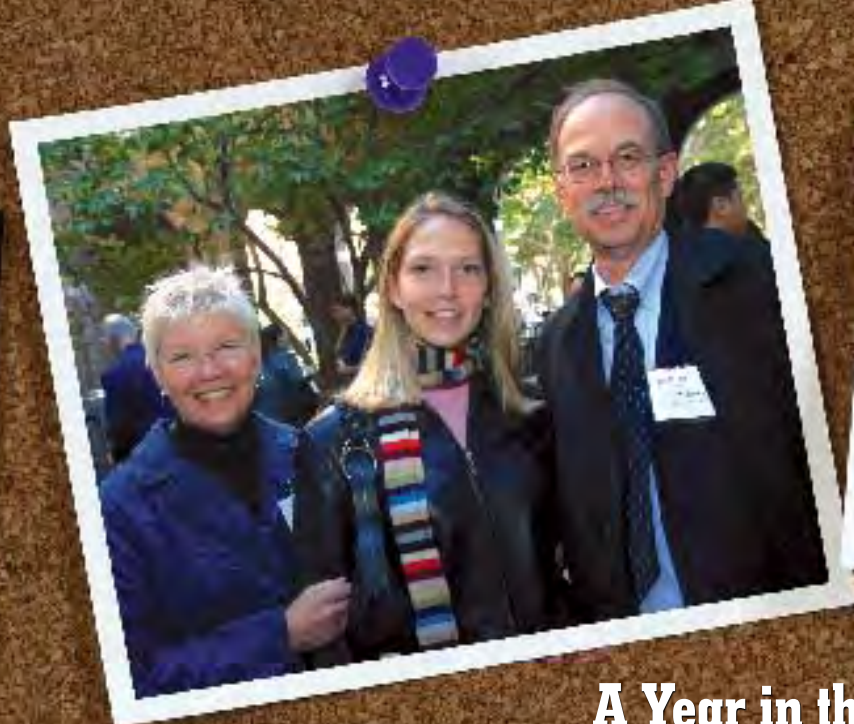
The husband was sentenced to death, and after the war in 1949, the woman was prosecuted for illegally depriving her husband of his liberty. Her defense was that her conduct had been lawful at the time—and, indeed, the law did forbid comments like her husband’s. A German appeals court nonetheless found her guilty. That decision, Hart said, was improper. He said the woman had committed no crime. Fuller, in contrast, said there are laws so evil they cannot be valid.

In his paper for the conference, Dyzenhaus deftly pointed out that Hart’s account of the case was misleading, and in telling ways. The German appeals court’s ruling, which Dyzenhaus provided to the conference in a new translation, turned largely on the fact that the woman was under no duty to speak, violated her husband’s privacy and did so for base motives. It was possible, then, to justify its ruling through conventional legal reasoning to reach its result. The appellate ruling, while perhaps not entirely convincing, was not an example of a misguided application of natural law.

Nicola Lacey, professor of criminal law and legal theory at the London School of Economics, spoke next, first declaring herself a “Hart-Fuller baby” for being born in February 1958. She went on to discuss the importance of the history that colored the original debate. Waldron seconded that point, discussing the “historical anxiety that pervades the rule of law.”

“An interesting feature of the concept of law,” Waldron continued, “is that it involves all the time looking over your shoulder.” He added: “Why is it that people feel when they have political power in their hands, and they have ends and purposes that they think are noble and good, why nevertheless do they think that’s not enough to justify the use of coercion? You have to be looking over your shoulder for a statute or looking over your shoulder for how some past doctrine would justify what you’re proposing to do. What would be the point of that?”

Waldron’s own remarks were, in part, a rousing elaboration on that question and, in part, an attack on Hart that would have pleased Fuller. He pointed out contradictions and inconsistencies in Hart’s writings, noting that “Hart himself toyed with many of the positions that Fuller held.” These are “hard things to say” about the “godfather” of jurisprudence, he noted. But, he added, “I weep when I think of the number of good political and jurisprudential instincts that have been stifled in classes taught by positivist legal philosophers who are following Hart’s example.” □ *Adam Liptak*



A Year in the Life of the Law School

Above left, Jody McCrory, Lindsay Shea McCrory '10 and Michael McCrory at "Family Day"; Above center, Judith Kaye '62, Chief Judge of the State of New York, with Raymond Lohier '91, deputy chief of securities and fraud unit of the U.S. Attorney's Office, Southern District of New York, at "Diversity Initiatives in the Practice of Law"

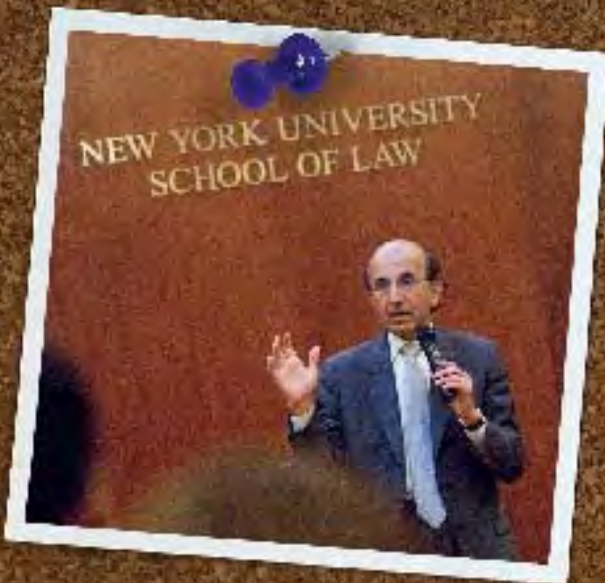


Above, NYU President Emeritus John Brademas with China Supreme People's Court Justice Wan Xiāng; above right, Cass Sunstein with Stephen Holmes; below right, Moshe Halbertal with Jewish Theological Seminary's Arnold Eisen, at "Conservative Judaism and the Re-imagining of Jewish Law"; below, Dean Richard Revesz with Richard Stewart, at the Häuser Global dinner





Above left, Yuri Schmidt speaking at "The Prosecution of Mikhail Khodorkovsky"; above, Arizona Gov. Janet Napolitano at the Brennan Center's first "Living Constitution" lecture; below, Judge Richard Posner at "Countering Terrorism: Blurred Focus, Halting Steps"



Above, NYC Schools Chancellor Joel Klein at "School Reform and Lawyers"; below right, Susan Hirsch, at "Prosecuting Terrorism: America's Challenge Then and Now"; below, Harvey Dale, with Justice Albie Sachs, at "An Afternoon Program with Justice Albie Sachs of the Constitutional Court of South Africa"





Dean Chenguang Wang

Eager for Clinical Education

Chinese legal scholars discuss the next step in legal education in China at the Timothy A. Gelatt Dialogue

THERE IS NO EXCUSE FOR LEGAL education to be boring," observed Professor Jerome Cohen, and so began the 12th annual Timothy A. Gelatt Dialogue on Law and Development in Asia. Sponsored by the U.S.-Asia Law Institute in cooperation with the Council on Foreign Relations, this year's dialogue focused on the role of legal education in China's rapidly changing society.

Keynote speaker Dean Chenguang Wang of Tsinghua Law School in Beijing highlighted the importance of legal education in China's reform process: "Through the development of legal education, law has become an independent subject, separate from politics and party policies." Wang reminisced about his decision to enter law school at the end of the Cultural Revolution, during the late '70s. "There were only two law schools in China. When I told my father that I was going to study law, he just asked 'What? Is there any law in China?'"

Today there are 604 law schools in China, and more than 300,000 law students. However, this growth has not been without problems. According to Wang, the most pressing issue today is the growing disparity between what is taught in law schools and the skills actually needed as a practicing attorney. "Many law professors say we should teach doctrine, something more abstract and philosophical," observed Wang. "But what about professional skills and professional ethics?"

Wang's comments were echoed by many of the night's panelists. Taiyun

Huang, deputy director of the Department of Criminal Legislation of the Standing Committee Legislative Affairs Commission, the legislative body of the National People's Congress, stated the issue succinctly: "The biggest problem is that teaching is separate from practice. Law schools do not teach how to use legal knowledge to resolve the practical problems." Dean Yixin Liao of Xiamen University Law School, located in Southern China, agreed, but noted that progress recently had been achieved, especially by introducing some U.S. teaching methods.

Consider, for instance, the growing use of clinical legal education. Ira Belkin, program officer for law and rights of the Ford Foundation, discussed one of the foundation's largest legal projects in China, the development of clinical courses in Chinese law schools. The foundation began its project in 2000, when clinical education was completely absent from the law school curriculum. There are now more than 6,000 clinical courses offered throughout China, covering subjects ranging from environmental pollution and labor law to human rights and legislative drafting. In addition to giving students professional skills, clinical legal education also helps inspire in them a commitment to public interest law. For Belkin, this is key: "Currently, there is not a well-developed public interest legal profession. The challenge going forward is how to increase the number of lawyers who serve underrepresented and vulnerable groups in China." □

Healing a Divided Nation

These are exceptionally partisan and polarized times, says Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit. In his 2007 James Madison Lecture, "Toward One America: A Vision in Law," he argued that the law can heal our fractured nation. "If law is part of the problem of polarization, it should likewise be part of the solution," he said.

Wilkinson cited myriad examples of divisiveness in politics and the law: Gerrymandering, for instance, reorders congressional districts to benefit candidates. Electioneering pulls politicians away from public service and tethers them to special interests. And both parties have made judicial confirmation hearings vicious, and overzealously called for presidential impeachment.

To promote national unity, Wilkinson said the balance between the three branches of government must be maintained; the collective rights of all American citizens upheld, and, most important, constitutional amendments must never take the place of legislation on hot-button issues such as same-sex marriage or abortion rights. "Legislation implies temporary winners and temporary losers," Wilkinson said. "Constitutionalizing tampers with our legal birthright and common heritage—with what we as a nation hold most dear."

The judiciary, too, must shoulder some of the burden of uniting the divided nation. Independence, neutrality and due process need to remain foremost in the minds of judges. Exercising judicial restraint, Wilkinson said, can help convince a sometimes-skeptical public that judges are arbiters of justice rather than privileged activists. Otherwise, Wilkinson warns, "The inevitable elitism of a judicial ruling class will spawn a populist rancor in America that will frustrate the attempt to bridge our most basic divides."



Norman Dorsen and
Hon. J. Harvie Wilkinson III



Judge Michael Wolff

that they stay out of trouble. Factors such as social stigma and easing reentry into society therefore should be considered. In Missouri, 97 percent of all felony offenders are eventually released from prison. Many of them return to a life of crime; some commit violent offenses. The problem is that ex-convicts find it difficult to find employment, support a family and restart their lives once they are back in society, even if their crimes were non-violent, and likely drug-related. The public is further at risk, Wolff adds, because aggression and violence are learned and reinforced in prison, and ex-offenders carry these behaviors into society after their release. "The non-violent learn from the violent in jail, and not the other way around," he said.

In 2005, the Missouri Sentencing Advisory Commission, which Wolff chairs, began analyzing prisoners' risks of reoffend-

ing upon release, and made recommendations to factor this probability into their sentences. A 2007 report from the commission heralded the news that Missouri's prison population and recidivism rates have since dropped substantially.

Wolff has also been at the forefront in addressing disproportionate sentencing. Under current drug laws, for instance, crack users and dealers receive much harsher sentences than those caught with powder cocaine. This is inherently biased, Wolff said, as crack cocaine use is more common among urban, poor African-American males. "Judges must develop analytical tools to make sure race, gender and location do not result in disparity," he said.

Other improvements to sentencing, Wolff said, include abandoning minimum requirements and replacing judicial discretion with evidence-based sentencing. Alternative sentences, such as restorative justice circles and community service, should strongly be considered for certain non-violent offenders. The bottom line, he said, is that punishment should never be harsher than is absolutely necessary. □

Native Americans Still Deprived of Legal Rights

the forest. To leave them in possession of their country was to leave the country a wilderness."

This legal reasoning, Williams argued, was predicated entirely on myths: "Do you see how these stereotypes frame legal discourse? The only possible way to justify this rule is to use the stereotype of Indian savagery." More than a century later, in the majority opinion for *Oliphant v. Suquamish Indian Tribe*

According to Williams, a long history of Native American diplomacy preceded the arrival of the white man; extensive trading and diplomatic networks covered North America. But once European settlers and, later, the U.S. government had the land they wanted, treaties were broken and forgotten. And the justice system didn't help.

Chief Justice John Marshall wrote the majority opinion for *Johnson v. M'Intosh* (1823), which determined that Native Americans had merely the right of occupancy to their land, but not the right to sell it to anyone but the government: "The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from

(1978), Justice William Rehnquist wrote that Indian tribal courts did not have jurisdiction over non-Indians who broke the law while on Indian land. Once Rehnquist became chief justice in 1986, the Court consistently ruled against Native Americans in cases involving jurisdiction claims, property rights and protection of sacred sites.

Still, Williams is encouraged by recent developments. In September 2007, the United Nations General Assembly approved the U.N. Declaration on the Rights of Indig-

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YOUR OWN**

✪

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PERFECT TITLE

✪

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WITHIN
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IRRIGABLE
GRAZING
AGRICULTURAL
DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SEALED BIDS ALLOTTED INDIAN LAND AS FOLLOWS:

Location.	Acres.	Average Price per Acre.	Location.	Acres.	Average Price per Acre.

enous Peoples. Only four countries voted against the declaration, the U.S. among them. Williams recently shifted his attention from Native American rights in the U.S. to international cases involving indigenous peoples. Now he runs the University of Arizona's Indigenous Peoples Law and Policy Program, which won a property rights victory for the Maya in Belize. "Imagine working in a legal system in which you can't use a language of racism about Indians," said Williams. "You'll win a lot." □

Pragmatic, Not Partisan

Salazar argues the benefits of political compromise at the Attorney General Robert Abrams Public Service Lecture.



have electricity or a telephone. Along with each of his seven siblings, Salazar was part of the first generation of his family to graduate from both high school and college. After attending the University of Michigan Law School and working as an attorney in the private sector, Salazar became the Colorado governor's chief legal adviser and then the state director of natural resources before being elected Colorado's first Hispanic attorney general. He was voted into office as the first Hispanic U.S. senator in the state in 2004, the same year that his brother John won a seat in the U.S. House of Representatives.

As a senator, Salazar has tackled issues as diverse as working on behalf of farmers whose wells were shut down because of interstate litigation and founding a new Office of Rural Health within the Department of Veterans Affairs. In his speech, Salazar also touched on a wide range of continuing issues, including water rights in the West, the conflict in Iraq and an energy policy heavily dependent on fossil fuels.

The solutions to these and other quandaries, Salazar said, remain within the country's grasp, but a new kind of leadership is necessary.

"It is time for ideas to help people in their everyday lives," he said. "Pragmatism, in my view, demands humility, for when our ideas do not solve the problems they were intended to solve, we have to admit that they were wrong, no matter what the political consequences are. But pragmatism is also inherently hopeful because it holds out that our ideas, our institutions and our society can always be improved upon and made more perfect, and perfecting them is our rightful pursuit." □

IN THE POLARIZED WORLD OF WASHINGTON politics, acts of bipartisanship can be seen as inflammatory. Just ask freshman U.S. Senator Ken Salazar of Colorado. He found controversy as part of the "Gang of 14," a group of moderate Republicans and Democrats who signed a 2005 agreement to permit filibustering in the judicial nomination process in "extraordinary" circumstances. And weeks after joining the Senate, Salazar, a Democrat, parted ways with his party and voted to confirm Alberto Gonzales as U.S. attorney general.

Yet Salazar does not hesitate to criticize the Bush administration, as he did during the 11th annual Attorney General Robert Abrams Public Service Lecture last January. Stressing the importance of pragmatism, he referred to "a neoconservative rush to war in Iraq" and the "false promises" of compassionate conservatism. "Our ideas either work or don't," he said. "When they don't, we have to find a new way."

Salazar described his humble beginnings as part of a farming family in a remote part of Colorado, in a home that did not

Leaders in Public Interest Series, 2007-08

On Monday evenings throughout the year, scholars and practitioners in public interest law came to the Law School to share their observations and experiences.



School Reform and Lawyers: The Road Less Traveled

Joel Klein, Chancellor of the New York City Department of Education



Confronting Injustice

Bryan Stevenson, NYU School of Law Professor and Executive Director, Equal Justice Initiative of Alabama



Practicing Public Interest Law in Private Practice

Jonathan Abady '90, Partner, Emery Celli Brinckerhoff & Abady

Diminished Capacity and Poverty Law:

Representing the Seriously Mentally Ill in Civil Matters

Lynn Kelly '82, then-Executive Director, MFY Legal Services



Disability Rights and Health Law on Behalf of Low Income People

Cary La Cheen '88, Senior Attorney, National Center for Law and Economic Justice



Using the Law to Advance Global Health

Jonathan Cohen, Project Director, Law and Health Initiative, Open Society Institute's Public Health Programs





Lisa Kung

What is Southern Justice?

Kung exposes the intent behind Southern legal codes at the 2007 Weiss Public Interest Forum.

LISA KUNG'S BONA FIDES AS A SOUTHERN lawyer are impeccable. As a staff attorney for the Southern Center for Human Rights, which was created in 1976 to respond to the deplorable conditions in prisons and jails in the South, Kung '97 won one of her biggest victories: a class action representing women prisoners who were housed in overcrowded conditions in an Alabama prison. *Laube v. Campbell* successfully reduced the number of women in a prison meant for 300 from more than 1,000 to the current population of 700. She

has also been lead or cocounsel in cases involving guard brutality at a Georgia prison incarcerating the state's most seriously mentally ill men; the lack of indigent defense in Coweta County, Georgia, and the welfare of all women incarcerated in Alabama. Kung became the center's director in January 2006. In January 2007, she was named by *American Lawyer* as one of the nation's top 50 litigators under age 45.

Kung framed her talk, "Twenty Years After *McCleskey*: Race and Racism in the Criminal Justice System in the Deep South,"

around the implications raised in tiny Jena, Louisiana, where in 2007 six black teens charged initially with attempted murder of a white classmate became a national focal point for concerns of racism in criminal prosecution. She posited that the tremendous attention paid to Jena is not because these events are unusual but because they are typical.

"Young black men get overcharged all the time," she said. In some places in the South, she noted, black men have a one in two chance of going to prison in their lifetime, and the chance that a black man would be placed in jail, on probation or in prison in his lifetime is nearly 100 percent.

Kung tied together the history of the criminal justice system in the South and how it has led to the current events in Jena. Starting with the "loophole" of the Thirteenth Amendment, which prohibits involuntary servitude "except as a punishment for crime," Kung described the post-Reconstruction criminal leasing system whereby imprisoned people were leased out in the South to solve labor shortage problems following the emancipation of slaves. She compared the effects of the post-Reconstruction black codes, which for the first time criminalized acts like loitering and vagrancy, to President Nixon's War on Drugs. Both, she said, accomplished three things: They created a presumptive illegality, allowed people to say, "This is not about race; this is about crime," and were designed to maintain white power structures, creating an environment where people of color are disproportionately prosecuted and overcharged.

The problem, Kung said, is that "the [Southern criminal justice] system is not broken. It's working exactly as it's designed to." □



Access to Justice: Fighting for High Quality Representation For Low Income Communities in Civil & Criminal Matters
David Udell '82, Director, Justice Program, Brennan Center for Justice



Beyond Lawyering: A Holistic Vision of Public Defense Robin Steinberg '82, Founder and Executive Director, Bronx Defenders



Promoting Community Equity in the Fight Against Discriminatory Lending Practices Sarah Ludwig '92, Executive Director, Neighborhood Economic Development Advocacy Project



Government and Public Service
Jimmy Yan '97, Office of Manhattan Borough President, and Suzanne Demitrio, U.S. Department of Labor



The (Im)Perfect Victim: Representing Real Victims of Human Trafficking in the U.S Ivy Lee '98, Director, Anti-Trafficking and Immigrant Rights Project, Asian Pacific Islander Legal Outreach



It's Not About Trade: What a Public Interest Lawyer Needs to Know about the WTO
Lori Wallach, Director, Public Citizen's Global Trade Watch

Scholarship in the Public Interest (from left, clockwise) Professors Lily Batchelder and Randy Hertz, Matt Squires '08 and Laura Abel, Deputy Director of the Justice Program at the Brennan Center



Studying the Fallout from the Subprime Mess

With foreclosures mounting, the Furman Center crunches data and uncovers the groups in the most economic peril.

AS THE SUBPRIME AND MORTGAGE foreclosure crisis exploded over the last year, new research by the Law School's Furman Center for Real Estate and Urban Policy captured the spotlight, gaining the attention of national media as well as local and federal authorities.

First, in a study released last October, the Furman Center analyzed the concentration of subprime loans among various

Hispanic populations; the 10 areas with the lowest rates, however, were mainly white. The analysis also showed that in 2006, New York City had one of the highest percentages of subprime loans, with 19.8 percent of home purchase loans from subprime lenders, higher than Boston (14.2%), San Francisco (8.4%) and Chicago (15.9%).

This data also prompted a *Times* editorial in which the paper called on lenders to meet their burden to prove "no discrimination has occurred." (Lenders have disputed the statistics, claiming they don't take into account "risk characteristics.")

Meanwhile, New York State's Division of Human Rights revealed the agency is investigating "a number of subprime lenders to see if they are targeting communities of color." Commissioner Kumiki Gibson told the *Times*, "There was enough data to compel us to look into" whether lenders' practices are discriminatory.

Turning to the growing foreclosure crisis, in April, the Furman Center released new data showing New York City renters are especially vulnerable. In 2007, some 60 percent of buildings that entered foreclosure were multifamily properties; that left at least 15,000 renter households—the majority living in two-family and four-family buildings in Brooklyn and Queens—in danger.

"The national discussion about foreclosures has largely focused on owners," Vicki Been, Elihu Root Professor of Law and director of the Furman Center, told the *Times*. "There's a whole group here that is not being talked about": renters.

This Furman Center analysis not only resulted in headlines; it also focused the attention of lawmakers.

In May, Been testified at a hearing of the U.S. House of Representatives Committee on Oversight and Government Reform's Subcommittee on Domestic Policy. In her testimony, Been noted that the Furman



racial and ethnic groups and within certain New York City neighborhoods and came to a distressing conclusion: Race matters. Even when income levels were comparable, home buyers in predominantly black and Hispanic areas were far more likely to be saddled with these high-risk mortgages than those in white neighborhoods.

In fact, compared to whites in New York City, African Americans were four times more likely and Hispanics were three times more likely to have received subprime loans. "The racial composition of neighborhoods is a stronger predictor of the rates of subprime loans than the income levels of the neighborhood," Ingrid Gould Ellen, associate professor of public policy and urban planning at NYU's Wagner School and codirector of the Furman Center, told *The Washington Post*.

The New York Times devoted much space to the Furman Center analysis, noting it "illustrates stark racial differences." The 10 areas with the highest rates of mortgages from subprime lenders had largely black and

Data at a Glance

Black New Yorkers are
FOUR TIMES AS LIKELY
to hold a subprime home purchase loan
as white New Yorkers.

Hispanics are
THREE TIMES AS LIKELY
as whites. (2006 data)

Black homeowners received
50%
of all the subprime refinance loans
issued in New York City, despite
making up only 20% of homeowners.
(2006 data)

LESS THAN 1%
of Manhattan home purchase loans
are subprime, compared to
a whopping 20% citywide
and 13% nationwide.
(2006 data)

76%
of New York City households
facing foreclosure are in
Brooklyn and Queens.
(2007 data)

TEN OF THE 15
New York City neighborhoods
with the highest rates of foreclosure
in 2007 also had the highest rates
of subprime lending in 2006.

From 2005 to 2007,
New York City
FORECLOSURE
FILINGS DOUBLED,
up from approximately
7,000 to nearly 15,000.

Compiled by the Furman Center

Center's research suggested that the foreclosure crisis could have a ripple effect, inflicting damage on neighborhoods overall, by displacing renters, reducing property values and lowering tax revenues.

House Democrats on the subcommittee called on President Bush to sign a bill that would provide \$15 billion in federal funds for communities to mitigate the potential impact. The hearing was featured in *The Wall Street Journal*.

Since then, Furman Center officials have met with city housing officials, community leaders, and state legislators, as policymakers and activists assess the best way to respond to the ongoing crisis. □

Antitrust Reform, One Year Later

AFTER MICROSOFT SETTLED CHARGES of breaking antitrust laws, some in the Republican-led Congress worried whether antitrust law was keeping up with the new Internet era.

So, in 2002, Congress created a panel to propose revisions to federal law. In 2007, after more than three years of meetings and study, the Antitrust Modernization Commission (AMC) issued a 449-page report, with some 80 recommendations.

At a time when antitrust law is widely seen as at its weakest point in decades, the commission—made up of 11 private firm attorneys and one economist—made mild suggestions. Focusing on issues of efficiency in enforcement, it avoided thornier questions, such as how to analyze exclusionary conduct—business tactics that are anticompetitive and harm consumers.

Still, at a Law School conference last April, called “One Year Later: The Antitrust Modernization Commission’s Report and the Challenges that Await Antitrust,” Commission Chair Deborah Garza declared the AMC a success. While acknowledging that the AMC made few proposals for strong change, Garza, a partner at Fried, Frank, Harris, Shriver & Jacobson who has since become U.S. deputy assistant attorney general of the antitrust division, contended the report would help frame the legislative

debate in years to come. “It’s still too early to pronounce this report dead,” added Bobby Burchfield, a partner at McDermott, Will & Emery. He was one of five commission members to participate in a roundtable comoderated by Walter J. Derenberg Professor of Trade Regulation Eleanor M. Fox ’61 and Charles L. Denison Professor Harry First, also director of the Law School’s Trade Regulation Program.

AMC member and Sullivan & Cromwell partner John Warden said that there wasn’t unanimous agreement on the panel and he was disappointed that most AMC members were largely satisfied with the state of antitrust law. “I thought we should have recommended more reform of treble damage actions, and more curtailment of state actions, and more reform of patents,” he said.

The commission did call for giving “serious consideration” to a Federal Trade Commission proposal to limit patent grants, reflecting the common view that patent grants are too broad. It also recommended legislation to overrule two Supreme Court rulings that prevent indirect purchasers

from suing for antitrust damages in federal court and limit defendants’ defenses by direct purchasers. The District of Columbia court and 36 state courts allow indirect purchasers to sue. The AMC recommended consolidating direct and indirect purchaser



Comoderators and conference organizers Professors Eleanor Fox and Harry First

claims under state and federal law into one federal forum and capping damages to overcharges to direct purchasers.

Students in Fox and First’s AMC seminar (who also participated in the conference) largely supported the report but were most enthusiastic about patent reform and indirect purchase recommendations, said Timothy Foster ’08. Those proposals, he said, “hit a home run.” □

The Thanks of a Lifetime

“I have fond memories of my time at NYU School of Law. Thanks to the philanthropy of alumni, I was awarded a John Norton Pomeroy Scholarship as well as other financial grants. My career achievements were attained in large part via the opportunities afforded to me by the Law School.

My wife Lyn, also an NYU Graduate School alumnus, and I want to show our appreciation to the Law School in our will by creating the Lyn and Gilbert M. Kapelman-John Norton Pomeroy Scholarship. It is our expectation that this program will provide Law School students with opportunities similar to those afforded to me.”

—GILBERT M. KAPELMAN ’63 (LL.M. ’73)

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Should Private Equity Fund Managers Be Subsidized?

PPRIVATE EQUITY FUNDS MANAGE OVER \$1 trillion in assets. The managers of these funds are paid generously for their services, with much of their incomes coming in the form of “carried interest.” Carried interest is a specified share (normally 20 percent) of the returns of the investment fund. But, instead of being taxed

of the *New York University Law Review* that is widely credited with sparking a fierce debate in Washington about reforming the treatment of carried interest. He concluded that private equity firms are “taking [the subsidy] further than Congress initially intended,” with detrimental consequences for both economic efficiency and tax equity.



at the 35 percent top individual income tax rate, carried interest paid to these private equity managers is often treated as a long-term capital gain and taxed at a preferred rate of 15 percent.

Last fall, the *New York University Tax Law Review* and the *Law Review* cosponsored a panel discussion on the tax treatment of the vast compensation received by private equity fund managers.

Victor Fleischer, associate professor at the University of Illinois College of Law, is author of an article in the April 2008 issue

In arguing against the status quo, he was joined on the panel by Mitchell Engler '90 (LL.M. '91), visiting professor of law at NYU, and Noël Cunningham (LL.M. '75), professor of law at NYU and the session's moderator. The latter two cowrote an article building on Fleischer's work and advocating a specific approach to reform.

Fleischer's article and ensuing calls for reform have engendered a strong response from the private equity industry. At the panel session, Jon Talisman spoke on the industry's behalf. Talisman, who was assistant secretary for tax policy in the Clinton administration and is now a lobbyist for private equity firms, argued that the treatment of carried interest fol-

lows naturally from the general tax preference for long-term investment returns and that reform proposals would discriminate against private equity relative to other forms of entrepreneurship.

Much like the panel itself, Washington is sharply divided on the issue of carried interest. As a new Congress and administration come to town in 2009 looking for ways to raise revenue, carried interest is expected to remain a hot topic, with panel members continuing to play important roles in the debate. □



An Alternate View of Tax Policy

At the 12th annual David R. Tillinghast Lecture on International Taxation, John Samuels (LL.M. '75), vice president and senior counsel for tax policy and planning at General Electric, argued against conventional wisdom, criticizing the standard U.S. view of international tax policy as aiming to promote worldwide economic welfare. Instead, he said, the goal should be to advance our national economic well-being.

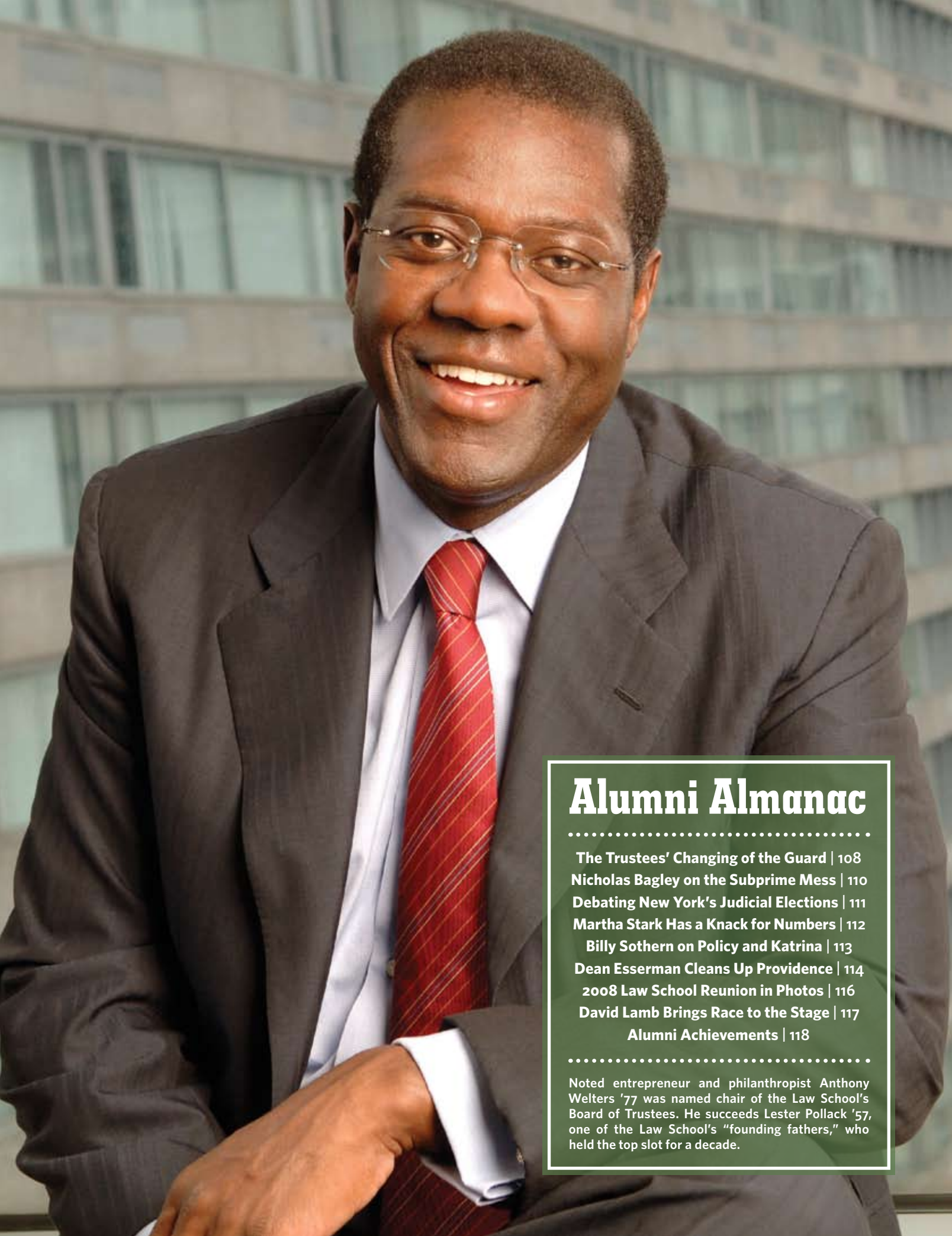
In a talk entitled “True North: Charting a Course for U.S. International Tax Policy in the Global Economy,” Samuels—chair of the International Tax Policy Forum, a coalition of 30 U.S. multinationals that sponsors tax research—took on the theory of capital export neutrality. This posits that U.S. firms should face as high a tax rate on outbound investment as on domestic investment; then, companies will pursue the investment with the highest yield. Samuels questioned the notion that U.S. investment overseas is a substitute for domestic investment. He said data suggests that foreign investments are actually complementary to U.S. corporate domestic investments. Given this lack of capital flight, Samuels contended that the U.S. should move to a territorial tax system, taxing entities on domestic income, not foreign income. Doing this, he said, will make the U.S. more competitive.

Another Perspective on the Taxation of U.S. Foreign Income

JAMES HINES, RICHARD A. MUSGRAVE PROFESSOR of Law and Economics at the University of Michigan, proposed an innovative new way of thinking about international tax at a discussion of his new paper, “Reconsidering the Taxation of Foreign Income.” Hines argued that U.S. foreign tax policy has been stuck in a political and intellectual rut and that the capital import neutrality, national neutrality and capital export neutrality debate has run its course. The standard

view is that, in order to avoid distortions, foreign business income ought to be taxed at the same rate as domestic income. Since tax rates around the world vary, one of the prevailing goals of the U.S. worldwide system of taxation has been to largely undo these differences. Hines scrutinizes one of the assumptions underlying the traditional debate, that foreign firm activities are not changed by the effects of home-country taxation of foreign income. His key point in the

discussion was that it is incorrect to think about foreign tax policy one investment at a time. Rather, tax policy ought to consider the effect on all investments, since where domestic firms choose to invest may influence investment by foreign firms. Rather than level the playing field, says Hines, home country taxation of foreign business income actually distorts the ownership of business assets—reducing both productivity and aggregate income. □



Alumni Almanac

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.....

Noted entrepreneur and philanthropist Anthony Walters '77 was named chair of the Law School's Board of Trustees. He succeeds Lester Pollack '57, one of the Law School's "founding fathers," who held the top slot for a decade.

Welters Named New Chair of Trustees

JUST THREE DECADES AFTER BECOMING the first person in his family to graduate from college and pursue an advanced degree, Anthony Walters '77 will become the new chair of the Law School's Board of Trustees at its first meeting of the new academic year on October 3.

"I am honored to take the helm of this remarkable institution," said Walters, who is currently vice chair and has been a board member since 1997. "I greatly appreciate the lessons that I have learned in leadership and philanthropy from Lester Pollack. I see this as a defining moment in the history of the Law School." Moving forward, he said, NYU Law needs to make sure that financial barriers are not a factor in students' attendance of or participation in the school.

Dean Richard Revesz said he is "thrilled" that Walters will assume the chairmanship. "Tony is one of our nation's leading entrepreneurs and an inspirational philanthropist," said Revesz, noting that Walters's "extraordinary generosity and vision" are responsible for the AnBryce Scholarship, a 10-year-old NYU Law program that offers full scholarships and support to exceptional J.D. students who were severely economically disadvantaged and are the first in their families to pursue graduate studies. "Tony's bold leadership of the Law School's capital campaign will allow us to continue to set ambitious goals," Revesz added.

Welters is executive vice president of UnitedHealth Group (UHG) in Washington,

D.C., and president of UHG's Public and Senior Markets Group, which includes the Ovations and AmeriChoice business units. Ovations is the largest U.S. company dedicated to meeting the health and well-being of people age 50 and older. Walters previously was president and chief executive officer of AmeriChoice Corporation, which he founded as Healthcare Management



Alternatives in 1989 with \$200,000 in seed money. Under his leadership, the company became a thriving enterprise and was acquired in 2002 by United Healthcare.

After graduating from NYU Law, Walters worked at the Securities and Exchange Commission, spent two years as the executive assistant to Senator Jacob Javits '26 and then held various positions at the U.S. Department of Transportation.

In 1995, Walters, who grew up with three brothers in a one-room tenement in Harlem, and his wife, Beatrice, launched the AnBryce Foundation. The goal: to cultivate

young minds from under-resourced and challenging environments for lives of personal and professional success. They first launched Camp Dogwood Summer Academy, a residential and educational program for needy youths. The AnBryce Scholarship followed in 1998. The Walters have contributed major gifts to the Law School of \$11.5 million; this year, they committed an additional \$7.5 million as a matching gift to complete the needed endowment of the AnBryce Scholarship. They also funded a chaired law professorship for a faculty mentor to oversee the academic components of the program, which reached its target of 10 students per J.D. class in 2007. Additionally, they have donated another \$10 million to the NYU Partners Fund.

A vice chair of NYU Law's trustee budget and finance committee, Walters also chairs the campaign steering committee and has been instrumental in helping NYU meet its goal of \$400 million. In 2004, he received the Vanderbilt Award, the highest honor bestowed upon an NYU Law graduate.

A dedicated philanthropist, Walters is vice chair of the Morehouse School of Medicine's board of directors. He serves on the boards of the Smithsonian Institution, the Horatio Alger Association of Distinguished Americans and the Healthcare Leadership Council. He has received the National Medical Fellowships Humanitarian Award, the Horatio Alger Award and the African American Chamber of Commerce Chairman's Award. □

Lester Pollack: An Illustrious Record of Leadership

After serving 10 years as chair of the Law School's Board of Trustees, Lester Pollack '57 will step down on October 3 and become chair emeritus.

"It has been exciting to lead such a talented group of trustees, and to partner with two dynamic and visionary deans," said Pollack. "The Law School has experienced a remarkable transformation, rising to become one of the most outstanding academic centers in our nation with a global presence. I am confident that the Law School will continue to reach new heights under Tony Walters."

The Law School community owes "a huge debt of gratitude" to Pollack, Dean Richard Revesz said, noting Pollack's key role in the 1970s in establishing the Law School's governance arrangements, including the Board of Trustees. "His visionary leadership has been essential to our success, and his extraordinary generosity is reflected in the Pollack Center for Law & Business and the breathtaking colloquium room in Furman Hall."



Pollack is founder and chairman of Centre Partners Management, a private equity firm, where he has been a managing director since 1986. He serves on the board of Bank Leumi USA and is director emeritus of U.S. Bancorp. He has served as director of numerous corporations, including the Loews Corporation, Paramount Communications, SunAmerica Inc. and Tidewater Inc.

A University trustee from 1987 through this summer, Pollack chairs the board of NYU's National Center on Philanthropy and the Law. Widely known for his humanitarian and philanthropic work, Pollack was chairman of the Conference of Presidents of Major American Jewish Organizations and honorary chair of the Anti-Defamation League. Last year Pollack received the Edward Weinfeld Award from the Law School Alumni Association and NYU's Albert Gallatin Medal in recognition of his professional achievements, commitment to philanthropy and dedication to NYU.

The First Decade: The AnBryce Scholarship Program Celebrates



Ten years after Beatrice and Anthony Walters '77 began funding full-tuition scholarships to outstanding J.D. students who are the first in their families to pursue a graduate degree, they joined current and former scholars and other distinguished guests to mark the anniversary at Le Bernardin. 1 Beatrice Walters graciously acknowledging the gift of a commemorative photo album; 2 The Walters with Lester Pollack '57, chairman of the board of trustees of the NYU School of Law; 3 Tony Walters with fellow trustee Dwight D. Opperman, who hosted the dinner

The Law School in the East: Tokyo and New Delhi Receptions



THE OTHER SIDE OF THE WORLD 1 Masako Mori, Yukiko Yamada, Satomi Ushijima and Yoiko Ando, and 2 Kei Ito (LL.M. '97) and Yasuhiro Fujie (LL.M. '97) at the Washington Square Club of Japan's Tokyo reception; 3 Professor Benedict Kingsbury and R.V. Anuradha (LL.M. '02) at a reception in New Delhi



Take the A-Train: 2007 Weinfeld Gala at Jazz at Lincoln Center



HITTING A HIGH NOTE 1 Diana Chavez and Andrew Boruch '07; 2 Sabrina Ursaner '10 and Daniel Blaser '06; 3 Lois Nacht Rosen '79, Adam Hahn and Jessica Rosen '08; 4 Jeffrey Greenblatt '83 and Lisa Greenblatt; 5 Jason Washington '07 and Thalia Theodore; 6 Peter Lallas '04 and Sara Dean; 7 Laurie Ferber '80 and Morris Podolsky; 8 Phylis Fogelson, Robert Fogelson '93 and Victoria Voytek

Subprime Safeguards We Needed

BY NICHOLAS BAGLEY '05

This op-ed first appeared on January 25, 2008 in The Washington Post; a longer version was published in Slate.

AS THE FEDERAL GOVERNMENT SCURRIES to prevent the subprime mortgage crisis from sending the economy into a deep recession, people are asking why it waited so long to intervene. But, in fact, a few years ago an obscure federal agency torpedoed legislation from a handful of states that would have made institutional investors far more chary of buying mortgages that were likely to fail. If the legislation had been permitted to take effect, the crisis we now face would probably look a lot less grim.

Historically, few lenders would give mortgages to borrowers with poor credit. The risk of default was simply too great. During the 1990s, however, major institutional players became more willing to purchase subprime loans as investments. Those loans would be pooled with similar loans, and slices of that pool were bought and sold as mortgage-backed securities.

The ready flow of capital from the secondary mortgage market led to an explosion in subprime lending. Unscrupulous lenders could reap the greatest profits by issuing subprime loans packed with unfavorable terms and then selling them for cash. A rash of borrowers found themselves saddled with predatory loans they had no hope of paying off.

To combat this surge in predatory lending, some state legislatures decided to stanch the flow of easy credit to subprime

lenders. In 2002, Georgia became the first state to tell players in the secondary mortgage market that they might be on the hook if they purchased loans deemed "predatory" under state law. Before, downstream owners of mortgage-backed securities might see the value of their investments drop, but that was generally the worst that could happen. Under the Georgia Fair Lending Act, however, players in the secondary mortgage market could face serious liability if they so much as touched a predatory loan.

The secondary market has an extraordinarily difficult time distinguishing predatory loans (bad) from appropriately priced subprime loans (good). Even if the line could be drawn with confidence, the market lacked the resources to gather the necessary information. As the then-General Accounting Office noted in its comprehensive review of predatory lending legislation in January 2004, "even the most stringent efforts cannot uncover some predatory loans."

Inevitably, the secondary mortgage market in Georgia's subprime loans ground to a halt. And that was the point: If buyers couldn't satisfy themselves that the loans weren't predatory, they should take their money elsewhere. Georgia legislators understood that impeding the capital flow to subprime loans might raise the cost of borrowing for some with poor credit but judged that this was more than balanced by protecting the most vulnerable from the scourge of predatory lending. New York, New Jersey and New Mexico made the same call and within two years had enacted their own versions of laws exposing

downstream owners of loans to fines if they bought predatory loans.

Enter the feds. Some of the biggest players in the secondary mortgage market are national banks, and the states' efforts to curb predatory lending clashed with banks' fervent desire to keep the market rolling. So the banks turned to the Treasury Department's Office of the Comptroller of the Currency. The primary regulatory responsibility of the OCC is ensuring the safety and soundness of the national bank system, but almost its entire budget comes from fees it imposes on banks, which have the option of incorporating under state law. Put another way, the agency's funding depends on keeping the banks happy. Little surprise, then, that the OCC acted when the national banks asked it to preempt subprime-mortgage laws such as Georgia's, arguing that they conflicted with federal banking law.

Despite the banks' thin legal arguments, the OCC issued regulations in early 2004 nullifying the state laws as they applied to national banks. The agency reasoned in part that the states just got it wrong. As the then-comptroller explained in a 2003 speech: "We know that it's possible to deal effectively with predatory lending without putting impediments in the way of those who provide access to legitimate subprime credit."

With the state laws nullified, national banks and their subsidiaries were free to engage in the practices the states were hoping to stamp out. (Indeed, Georgia scuttled its law because it didn't want to give national banks a competitive advantage over its state institutions.) Facing pressure from subprime lenders and Wall Street, and left without a real chance of holding investors responsible for purchasing ill-advised loans, state legislatures gave up on trying to meaningfully expose downstream buyers to liability for facilitating predatory lending.

In retrospect, the OCC's decision looks wrongheaded. What the agency took to be shortsighted consumer protection laws laden with hidden costs turned out to be prescient market-corrective reforms. It's impossible to know for sure, but had the state laws been permitted to go into effect, investors would probably be sitting on fewer subprime loans that will never be repaid.

The feds ignored the basic principle that no level of government has a monopoly on good policy. As federal officials move to clean up the subprime mess, it's worth remembering that they helped to create it. □

Nicholas Bagley works as an attorney for the U.S. Department of Justice's civil appellate division.



IDEAS REWARDED Last October, Richard Parker, chair of the American Bar Association's Administrative Law and Regulatory Practice Section Scholarship Committee, presented Dean Richard Revesz and Nicholas Bagley with the section's 2006 scholarship award for their article, "Centralized Oversight of the Regulatory State."

Debating New York's Judicial Elections

Lawyers argue the finer points of how the state chooses trial judges to run for the bench.



THE JUDGES' JURY Andrew Rossman, Caitlin Halligan, Samuel Issacharoff, Lawrence Mandelker, Richard Pildes and Kent Yalowitz

NEW YORK HAS A UNIQUE SYSTEM of nominating its candidates for state trial court: Political parties hold behind-closed-doors conventions to select who runs in judicial elections. This contrasts with the process for other courts in the Empire State, such as city court, family court and surrogate court, where nominees are selected through primary elections. The convention system's constitutionality was at the center of *López-Torres v. New York State Board of Elections*, a case that made its way to the Supreme Court in October 2007.

Before the Court handed down its verdict, a panel including lawyers from both sides of the case and faculty experts in election law analyzed New York's convention process and debated the value of judicial elections, during the NYU Law Alumni Association's annual fall lecture, "Are New York Judicial Elections in Crisis?"

Moderator Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, provided background. Surrogate Judge Margarita López-Torres first sued the New York State Board of Elections in 2004 after she claimed that her refusal to hire the daughter of a prominent Democrat as a clerk led to the denial of her nomination to run for a spot on the State Supreme Court. The suit alleged that the closed convention process allowed the spurned party boss to give the nod to another judge. Issacharoff pointed out the inherent constitutional difficulty in deciding a case like *López-Torres*. "We pride ourselves on being a democracy and living under a constitutional order," he said, "but our constitution says very little about the greater future of our democracy, which is how people get elected."

Richard Pildes, Sudler Family Professor of Constitutional Law, saw *López-Torres* as just one flare-up in the greater epidemic of troubling judicial elections. He suggested

changing the event's title to "Are Judicial Elections a Crisis?" calling them "a truly bad idea" and the worst American contribution to the design of government and law.

No other nation holds judicial elections, which lead some to wonder how a judge remains impartial while seeking contributions and political endorsements. Lawrence Mandelker '68, an election-law expert and then-president of the NYU Law Alumni Association, discussed the pros and cons of elective versus appointive methods of judicial selection, noting that while *López-Torres* involves important constitutional issues concerning specific methods of nominating candidates, "it does not address the normative question of whether it's a good idea for judges to be elected in the first place."

In the basic argument of *López-Torres*, however, critics allege conventions violate the First Amendment by denying voters a direct choice in whom to nominate, and that they lack transparency and give political party leaders, not rank-and-file party members, the power to choose judicial candidates. It is the secrecy of these "smoke-filled rooms" that panelist Kent Yalowitz said promotes corruption and undue favoritism in judicial nominations. "Every district in New York, for every party, is controlled by one person," said Yalowitz, who has represented López-Torres since 2004. "Party members who want to participate in the system get frozen out."

But Caitlin Halligan, the former solicitor general for New York, argued that political parties have the right to opt for a closed convention nominating system. Andrew Rossman, counsel of record for the Manhattan Democratic Party in *López-Torres*, further explained that New York's system was enacted by a 1921 law designed to stop judges from having to take campaign contributions during their primary and

election campaigns. "[Lawmakers] didn't do this in a vacuum," Rossman said. "They did it after a nine-year experiment with primaries that proved to be a complete failure."

Alas, the final word was not to be found in the Supreme Court decision in January 2008. By ruling unanimously that New York's conventions are constitutional, the Court placed the responsibility on lawmakers in Albany to continue to determine New York's system of judicial nominations. □

YOUR ANNUAL FUND AT WORK

Exhibit A:

CRAP increases from \$2.3 million in 2002 to \$4.4 million in 2008.

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The Collector

Law Women's Alumna of the Year is New York City Commissioner of Finance Martha Stark.

SPEND AN HOUR WITH MARTHA STARK '86, and you'll come away with little doubt that she'll find a simple solution to any complex problem presented to her. She spent a winter afternoon assembling a bookshelf and television stand just for the fun of it. Puzzles, thorny math problems, the intricacies of the tax code, build-it-yourself furniture, you name it; New York City's Commissioner of Finance isn't afraid to roll up her sleeves. "I like to fix things," she says simply with a broad smile, her right leg tucked neatly under her left while she sits on a sofa in her toy-and-artifact-filled office. "I like putting things together in a logical way."

For the chief of a department that oversees a staff of 2,300 and collects \$23 billion in taxes from New York residents every year, that's a handy attribute to have. Martha Stark is the recipient of the NYU Law Women's third annual Alumna of the Year Award and the city's first African-American woman to serve as finance commissioner. She holds a complex job: The finance department not only collects the city's property and business taxes, but also runs the city treasury, records all mortgages and deeds and even adjudicates parking tickets. That last item explains why she's so attached to the retired meter parked behind her desk.

Stark is not your typical bureaucrat. Her office is jam-packed with an eclectic

"She keeps you on your toes," says Mary Gotsopoulos, chief administrative law judge for Finance's adjudication division, who reports to her. "She may not agree with you, but she'll always listen to what you have to say. You have to really convince her though, because she knows every aspect of this agency. She's very hands-on."

Stark's detailed grasp of how her agency works again demonstrates her innate talent for pushing aside noise and static to focus on what's important. That helps explain her natural affinity with math and statistics. Born and raised in Brownsville, Brooklyn, this graduate of Brooklyn Tech High School has been intrigued with numbers since she played math games with her bookkeeper father, a high school dropout who taught her to fill out tax returns when she was 15. "I believe in the power of numbers," she said in a 2006 commentary on the National Public Radio program *All Things Considered*. "Maybe it is just that numbers don't lie." So when you hear Stark say with utter sincerity, "I have a passion for property tax," you can't help believing her. For Stark, her job is the equivalent of a math junkie's Nirvana: the



also worked as the head of policy operations under Manhattan Borough President Ruth Messinger.

Stark didn't always intend to work for government. At first, she thought she wanted to be a journalist, but after a serious biking accident in 1980 during her junior year at NYU, she changed her mind. To make up for time lost due to her hospitalization, she switched majors to political science, which eventually led her to law school. That was the positive aftereffect of her accident; the negative robbed her, at least in the short run, of her other passion: basketball. As an undergrad, she played forward for NYU—and now she frequently cheers on her favorite Women's National Basketball Association team, the Liberty.

Her love of basketball and the discipline and teamwork it requires fits into her can-do approach to the law. While she worked as a tax attorney for only four years before she moved into city government, she believes that studying the law helped her figure out how to effectively push for change. "Knowing the law matters," she says. "But far too often we say, 'Here are the rules; this is what you can't do.' What's great about the law is that the rules can be changed. It gives you the freedom and the flexibility to be creative."

In the end, that's what matters most to Stark: using her prodigious intellectual, legal and financial skills to keep the city's ship afloat. □ *Dody Tsiantar*

"What's great about the law is that the rules can be changed. It gives you the freedom and the flexibility to be creative."

mix of objects, from a basketball net to a Jamaican cooking pot. A Mr. Potato Head shares space with an antique bowling trophy on her credenza, and an inflatable SpongeBob hangs below a dartboard. "He can be whomever I want him to be when I throw those darts," she chuckles. "It depends on who I'm mad at."

That SpongeBob doesn't have a single puncture hole says a lot about the 47-year-old Stark—and her aim. She has such an easygoing manner, it's hard to imagine her angry at anyone. But don't be fooled; Stark is no pushover.

intersection of policy, law and numbers, a place she firmly believes has a direct impact on people's lives.

Her stint as finance commissioner—she was appointed by Mayor Michael Bloomberg in 2002—is not her first in city government. She served in several management positions in the city's finance department under Mayor David Dinkins from 1990 to 1993. Among her accomplishments: the establishment of a unit that allows for the arbitration of business tax disputes. In 1993, she was named a White House Fellow, assigned to the Department of State. She has

Breakdown on the Bayou

Billy Sothern chronicles life in post-Katrina New Orleans.

NATIVE NEW YORKER BILLY SOTHERN '01 became acquainted with New Orleans as a summer associate at a capital defense nonprofit agency, where he worked alongside idealistic lawyers and activists from around the world. Seeing the government's indifference to the abject

Returning to his pre-Emancipation-era home less than two months after the storm, Sothern began writing a series of essays that were published in *The Nation*, *Paris Review*, *Salon* and elsewhere. In 2007, those and new essays were assembled into Sothern's first book, *Down in New Orleans*, which he describes as "an interrogation of the conservative notion that a government which governs least, governs best." In this first-person account of the year following the storm, Sothern lays bare the federal government's failures in response to the disaster, and ties in the myriad racial and social-justice issues that continue to plague the city.

Now the director of the Capital Appeals Project, Sothern represents death-row inmates from across Louisiana in trial and post-conviction appeals. In *Louisiana v. Kennedy*, which went before the Supreme Court in April, Sothern's office directed Patrick Kennedy's appeal and served as cocounsel in the case. Sothern was also recently awarded a Soros media fellowship to write his next book, *Put Childish Things Away*, about unfair prison sentencing.

Senior Writer Graham Reed spoke with Sothern about his first book, *Down in New Orleans*, and life as a New Orleans resident three years after Hurricane Katrina.

Your book reads like a catharsis. Why treat this national tragedy so personally? I was a part of the story, so to disengage that would

be to tell only half of it. Besides, my vantage point as a lawyer provided a lens to view the broader social-justice issues in the city.

How has your work changed as a result of Katrina? The storm and its exposure of the wholesale failure of the government to address the needs of people widened my sense of mandate to write not only about what I know as an attorney, but to look at other issues—public housing, urban poverty—that impact my clients' lives.

Your description of the poverty and racism is overwhelming. How do you stay hopeful that things can be improved? I believe that what people saw in New Orleans was horrifying to them. I hope the disaster was the pendulum's apex for governance that leaves the weakest to fend for themselves under difficult circumstances.

Are you still committed to calling New Orleans your home? My wife and I have this big old falling-over place that we'll be fixing up for the next 25 or 30 years. I'd no sooner leave New Orleans than anyone would their home in a time of great need. □



poverty and racism in the city through the eyes of his non-American colleagues, he became convinced that he could do meaningful work in New Orleans and adopted the city as his home upon graduation.

Four years later as Hurricane Katrina approached, a reluctant Sothern and his wife left for Oxford, Mississippi, where they watched the suffering and devastation on television as thousands of residents, most of them poor, black and elderly, were abandoned and left to die in the rising waters. The nation was shocked to see images of New Orleans that compared to third-world countries, but Sothern responds that the "city had long displayed such signs to anyone who cared to look at them."

Exhibit B:
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Eleven Minutes with Dennis Jacobs '73

The chief judge of the U.S. Court of Appeals for the Second Circuit gave a charming and heartfelt keynote speech at the Annual Alumni Luncheon in which he reflected on career milestones. "The greatest distinction that any lawyer can have is simply to represent real clients in a real crisis," Jacobs said. "It is one of the things I miss about law practice."



A Guardian of Providence

Dean Esserman, a lawyer-turned-cop, transforms the police force of New England's second-largest city.

ONE HORRIFIC NIGHT IN APRIL 2005, four people, including a police detective sergeant, were shot in Providence, Rhode Island. The perpetrator was in one hospital room while the dying officer lay a few doors down. Police Chief Dean Esserman '83 stationed a guard outside the shooter's room, "setting a moral tone: We don't hurt the person who did it," says Teny Gross, executive director of the city's Institute for the Study and Practice of Nonviolence. And Esserman stayed by the officer's side all night.

Since taking office in January 2003, Esserman has exhibited a compassionate leadership style, showing up at nearly every homicide scene and at every wake. "He shows that we care tremendously when someone gets hurt in this city," says Gross.

A one-time lawyer and a friend of former NYC Police Chief William Bratton, Esserman is credited with cleaning up a corrupt department and cutting crime. "He's a consensus builder," says Bratton, now head of the Los Angeles police. "He's a listener. He's an inspirational leader, and he's liked by the community."

When Esserman arrived in Providence, the police "had become a king's army," he says, in which the former mayor—convicted of racketeering conspiracy—controlled the police force with cronyism

and payoffs. Positions and promotions could be bought for \$3,500 to \$5,000.

David Cicilline, the new mayor, gave him carte blanche. "I had the entire command staff retire, and I promoted great people who never played the game to get ahead," says Esserman. One of his first actions was to decentralize—dividing the city into nine districts with a neighborhood police substation in each. He also embraced the community policing model in which cops walk the beat to identify neighborhood concerns and consult the appropriate social service agencies. Equally key, he adopted the weekly CompStat (computer statistics) strategy meetings that Bratton had used in NYC, tracking crime and holding precinct commanders accountable for bringing the numbers down.

Results-oriented and innovative, Esserman launched successful programs to combat drugs and violence: One gives corrigible drug offenders a second chance, and another created a gun task force after a 14-year-old boy was shot by a friend.

Providence has seen a steady drop in violent crime since Esserman took office. According to figures provided by Providence officials, murders were above the national rate in 2002 and reached par by 2007, a 39 percent drop. Rape fell 64 percent; robbery dropped 30 percent, and aggravated assault,

17 percent. "The police department in Providence is helping to bring crime rates down at a time when, across the nation, crime rates are stubbornly stable," says Andrew Karmen, criminologist at John Jay College.

Esserman was raised in a progressive Jewish home in Manhattan that became "a salon" on weekends, filled with musicians and artists whom his physician dad treated for free. Every summer his father volunteered in developing nations and took his family along. "That's how I learned about service," says Esserman. He vividly remembers helping his father stitch up a Guatemalan man's arm that had been sliced open with a machete, and decided to follow his dad into medicine.

In high school at the Ethical Culture Fieldston School, he trained as an EMT and volunteered in the Central Park Medical Rescue unit. He realized that police are the first responders at most accidents, and should be trained as medics. "For police to see themselves simply as law enforcers misses the point," he says. After entering Dartmouth College, he created a medical rescue unit for the NYC Transit Police, and raised enough money to send officers to Dartmouth to study Spanish.

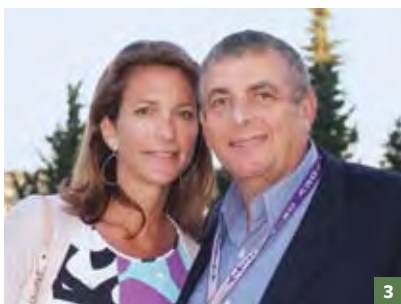
Esserman nonetheless dropped medicine and graduated from Dartmouth in 1979 as a history major. A year later, he entered NYU School of Law: "NYU was the doorway to the beginning of my career as a prosecutor, which started my career in law enforcement." In 1987, Esserman left the district attorney's office to become general counsel to the NYC Transit Police. Bratton became chief of the transit police in 1990, and their two years

together would prove deeply transformative. In 1991, Esserman made the unprecedented move to police work. "He liked the nuts and bolts of policing and understood he could make more of a difference," says Bratton.

Esserman landed a job as the assistant police chief in New Haven, Connecticut, and entered the police academy. "I was the oldest recruit and the highest ranking," Esserman says proudly. He graduated in 1992, the year he married Gilda Hernandez, a detective turned school administrator. They have three children.

Esserman now earns \$158,000 a year as police chief—slightly less than a first-year associate at some of the large firms. "I don't regret that, not even for a minute," he says. "I've been shot at. I've put handcuffs on a lot of people, and I've delivered eight babies. I've done a lot more than I thought I would when I put on that uniform way back when." □ *Jennifer Frey*



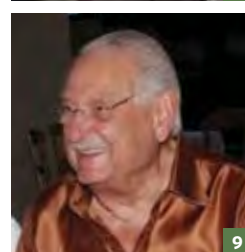


Analyzing Presidential Elections

As we approach the final months of the 2008 presidential election, issues such as the wartime powers of the president and the role of the courts in elections assume critical importance. In mid-July, Supreme Court Justice Clarence Thomas and Richard Pildes, Sudler Family Professor of Constitutional Law, considered these matters when they convened "Presidential Powers, Presidential Elections," a three-day conference for members of the Law School's Board of Trustees, faculty, alumni and their guests at NYU's Villa La Pietra in Florence, Italy.



1 Justice Clarence Thomas and panelist Gregory Maggs, a professor at George Washington University School of Law; 2 Beatrice Welters, Board Chair-Elect Anthony Welters '77, Board Chair Lester Pollack '57 and Geri Pollack; 3 Beth Wilf and Trustee Leonard Wilf (LL.M. '77); 4 Trustee Alan Fuchsberg '79; 5 The conference's opening dinner at Florence's famed Orsanmichele; 6 Traditional flag throwers provide entertainment; 7 Former U.S. Representative Frank Guarini Jr. '50 (LL.M. '55) and his sister C. Marie Mangin; 8 Professor Richard Pildes with Nira; 9 Trustee Dwight Opperman; 10 Anthony Welters and Trustee Ronald Moelis '82; 11 Lunch at Castello di Vincigliata.



Weekend at the Waldorf... and at Washington Square

At this year's reunion, guests explored legal issues by day and danced away the night. Daytime panels included "Private Enforcement of the Securities Laws," moderated by Stephen Choi, Murray and Kathleen Bring Professor of Law; "Climate Policy—Beyond Kyoto," moderated by University Professor Richard Stewart; "Role of the Courts in Immigration," moderated by Professor Nancy Morawetz '81, and "Privacy—Is There Any Left?" moderated by University Professor Arthur Miller. Later, the celebration continued well into the evening at the Waldorf-Astoria.



Examining Black-Latino Relations, Gently

BY GINIA BELLAFANTE

EARLIER THIS SPRING, IN TRAIN STATIONS and subway cars across the city, advertisements began appearing for a play that was to begin a limited engagement at Florence Gould Hall of the Alliance Française. This might easily pass without comment, were it not for the matter of the show's already quiet if substantial success. "Platanos & Collard Greens" was first produced in a tiny Midtown theater—70 seats—in 2003 and has moved gradually and intermittently to larger spaces since, with virtually nothing but conversation to endorse it.

Though the show's creator, David Lamb, had taken out a few spots on urban radio over the years, he relied primarily on his audiences to do his promotional work for him. The show functions without a press agent; until a few weeks ago, it had no Web site. The cast is entirely anonymous, in the purest, hoariest sense of the term. The production notes for "Platanos & Collard Greens" may be singular in the world of New York theater for featuring not one actor whose credits include an outing on "Law & Order" or its subsidiaries.

By the end of its run at Gould Hall in September, though, about 90,000 people will have seen "Platanos & Collard Greens," a figure that exceeds the number who have taken a seat at "The Year of Magical Thinking" on Broadway by close to 20,000.

Mr. Lamb's play represents the strongest evidence at the moment of the blunt racial divide that marks so much cultural

consumption—particularly in the theater, where projects attracting ethnically diverse audiences, either by design or in effect, come upon us with the regularity of orange groves in a cold climate. André 3000 is a crossover artist. Tyler Perry is not.

"Platanos & Collard Greens" concerns itself with the tension between the African-American and Latino communities in New York and the overwhelming majority of men and women who go to see it, some over and over, are nonwhites.

In its ethos and sentiment, the play rests somewhere between a civics lesson and Howard Finster's folk art. Mr. Lamb doesn't traffic in the imperatives of angry reproach. "Platanos & Collard Greens" is a simplistic morality tale rendered in cheerful tones, a look at the refraction of racial prejudice from one minority group to another, and a primer in how best to curtail pernicious stereotype.

The story, some of which is told in belabored hip-hop rhymes, revolves around a group of ambitious students at Hunter College, an election for student body president and a chaste love affair between a young African-American man and Dominican woman whose mother disapproves of the relationship. Mr. Lamb removes the potentially complicating factor of class so that the mother's criticism of her daughter's boyfriend is rooted purely in the color of his skin. Hard working, the boy comes from a well-educated family. The mother, in denial of her own African roots, is the sort of woman who admonishes her daughter to stay out of the sun so as not to look like "those Haitians."

The particulars of the storyline have made the play quite popular on college campuses, where Mr. Lamb is typically asked to stage it at the invitation of student minority groups. In the past few years, "Platanos & Collard Greens" has been produced at more than 100 colleges and universities across the country, including Princeton, Cornell and Wesleyan.

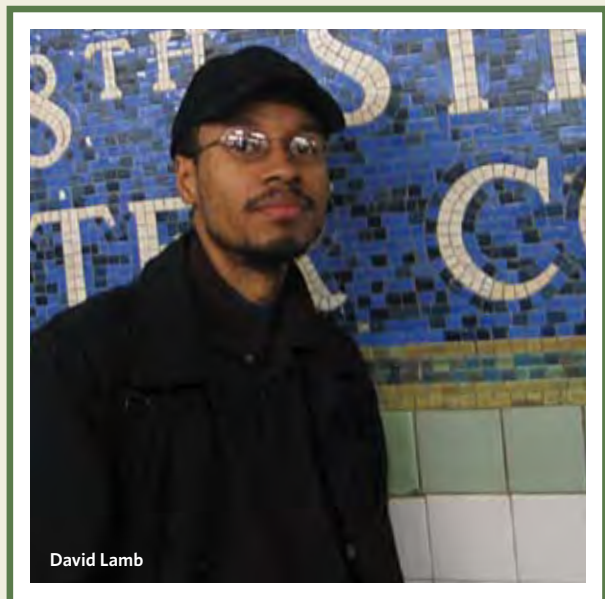
A graduate of Hunter College himself, Mr. Lamb grew up in a housing project in Queens before going on to graduate work at the Woodrow Wilson School of Public and International Affairs at Princeton and later to New York University, where he studied law. It was at NYU that he began writing hip-hop fiction, self-publishing a novel "Do Platanos Go Wit' Collard Greens?" in 1995 after he finished studying for the bar. Soon after the book was completed, Mr. Lamb was asked to talk to students at a public high school in the city where conflict had developed between African-American and Puerto Rican students on one side and newly arrived Dominican immigrants on the other. Eventually, the book became part of the curriculum of a handful of alternative schools in New York; Mr. Lamb was a popular speaker.

The teenagers he encountered, Mr. Lamb and his wife Jamillah, explained, introducing "Platanos" to its audience at the 400-seat Gould Hall Sunday afternoon, began expressing a wish to see the characters in the novel come to life. With no theatrical experience at all, Mr. Lamb—then working as a lawyer for a low-income housing fund—and Jamillah, a banker, invested \$20,000 of their own to stage the play at the Producers Club four years ago.

"Platanos & Collard Greens" wears its allegiance to political solidarity obligatorily, like a host who inquires after the health of his dinner guests when all he wants to do is pour the wine and ladle the dirt. Mr. Lamb surely believes on some level that ending factionalism in the inner city could help to put to rest the afflictions that degrade it. But it is the idea of racial harmony as a lifestyle choice—a lot easier than the alternative, and considerably more fun—that compels him instead.

His inspiration for the story, he said recently, came not from any personal experience with the kind of relationship he depicts. It came instead from his internship during college for Representative José E. Serrano, the Bronx Democrat, then a state assemblyman. When the two men met, Mr. Serrano remembered the name Lamb as belonging to someone he fondly recalled from middle school. Mr. Serrano, as it happened, had known Mr. Lamb's uncle. And from that point on, Mr. Lamb said, he recognized congeniality as the best preparation for riding the currents through which life might carry you.

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David Lamb

BLAPA Annual Spring Dinner



1 Black, Latino, Asian Pacific American Law Alumni Association (BLAPA) president Eddie Rodriguez '97 with distinguished service honoree Raymond Lohier '91 and BLAPA board member Jimmy Yan '97; 2 BLAPA Scholar April Gu '10; 3 Visiting Professor Derrick A. Bell Jr. with Lisa Marie Boykin '95

Recent Grad Reception



At Mannahatta in the Bowery: 1 Nicholas Arons '04, Anna Roberts '03, John Kleeberg '03 and Nathaniel Kolodny '04; 2 Jade Hon '04, Robyn Eaton '04 and Emily Fishman '06 caught up with former classmates; 3 Emily Bushnell Johnston '05, Daniel Blaser '06, Marsha Metrisko and Peter Lallas '04

Applause, Applause: Notable Alumni Career Highlights

William H. Bowen (LL.M. '50), former CEO of First Commercial Corp., was inducted into the Arkansas Business Hall of Fame. He was president of Commercial National Bank, chief of staff for Governor Bill Clinton, president and CEO of Healthsource Arkansas Ventures and dean of the University of Arkansas at Little Rock Law School.

The U.S. Post Office building in Jersey City has been named for former U.S. congressman and state senator **Frank J. Guarini '50**.

C. Judson Hamlin '63 received the James J. McLaughlin Award from the Civil Trial Bar Section of the New Jersey State Bar Association. He served on the superior court for 20 years until 1998, and is now counsel with Purcell Ries Shannon Mulcahy & O'Neill.

Robert Lipp '69 received an honorary degree from Williams College.

Barbara Grumet '69 was named dean of the School of Professional Studies at New York City College of Technology.

Harold Max Messmer '70 won a 2007 Ernst & Young Entrepreneur of the Year Award.

Sandra Sosnoff Baird '76 has been appointed chief magistrate of the Connecticut Family Support Magistrates.

William Finkelstein (LL.M. '78) received the International Trademark Association's 2007 President's Award. He is a partner with Dreier Stein & Kahan in Santa Monica.

Edwin Villasor (LL.M. '78) has been appointed assistant court administrator of the Supreme Court of the Philippines. He has been a judge in the Philippines since 1991.

Lawyers For Children, founded by executive director **Karen Freedman '80**, received the Hodson Award for public service from the American Bar Association's Government and Public Sector Lawyers Division.

John Coates '89 was presented with the John F. Cogan Jr. Professorship of Law and Economics at Harvard Law School, where he has been on the faculty since 1997.

Amy Silverstein '90 published *Sick Girl*, a memoir that describes her life since her 2L year when she received a donor heart transplanted from a 13-year-old.

Paul Berman '95 is the new dean of the Sandra Day O'Connor College of Law at Arizona State University.

Megan Lewis '99 has been appointed chief of the newly created Affirmative Litigation Section of the Division of Law in the New Jersey Attorney General's office.

Billy Sothern '01 of the Louisiana Capital Assistance Center, **Caroline Cincotta '07** of the ACLU's Immigrants' Rights Project and **Joshua Perry '07** of the Orleans Parish Public Defender are among 18 Soros Justice Fellows named by the Open Society Institute. Fellows receive up to \$79,500 for their work to reform the U.S. justice system.

Chukwuemeka Onyejekwe '06 has filmed a reality program about his transition from corporate lawyer to hip-hop rapper. He's now known as "Mekka Don" and his series, "Mekka Don: The 'Legal' Hustle," can be seen on YouTube.

Stephen Long (LL.M. '07) tied for the top score on the Texas Bar Exam, taken by 2,800 people in July 2007. Long is an associate in the Dallas tax practice of Jones Day.



Making the Grade

.....

**New Jersey Attorney General Addresses
2008 Graduates at Convocation | 120**

Singapore Program's First Graduation | 121

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Sharing the Moment: Hooding Album | 124

Commencement at Yankee Stadium | 127

.....

Josh Warren '08 rides the subway to the university-wide NYU commencement at Yankee Stadium in the Bronx. The University distributed roundtrip Metro-Cards to graduates making the northward pilgrimage on the B, D and 4 trains.

Class of 2008: "The Sky is the Limit"



Anne Milgram



Gregory Scanlan



Coralie Colson

ANNE MILGRAM '96, THE SECOND-youngest attorney general in New Jersey history, stepped up to the microphone at the WaMu Theater at Madison Square Garden on May 21, providing living proof for the Class of 2008 that a degree from the Law School could take these graduates wherever they want to go.

During her convocation address, she recalled ribbing Law School friends for studying too hard for a criminal procedure exam; she took the course pass-fail because she was convinced that she would never practice criminal law. As it turned out, Milgram was the only one of her pals to pursue a criminal law career, starting out as a Manhattan assistant district attorney before eventually becoming the lead prosecutor for human trafficking crimes at the U.S. Department of Justice and then New Jersey's top law enforcement officer at age 36.

"If I can be attorney general, you can, too," Milgram said, adding later, "The sky is the limit for NYU Law grads."

While extolling NYU Law's first-rate education, Milgram offered this key advice: "If you make a choice that you don't like, in your life or in your career, make another one. There is not one path."

Gregory Scanlan, the J.D. student speaker, also spoke about paths, likening the law school experience to "the search for the medallion," an annual tradition in his native St. Paul, Minnesota, where, during the winter carnival, town residents would follow clues to find a small white disk hidden in the snow-filled landscape. "NYU is a place where, no matter where you're starting from or what you imagine your medallion looks like, you can choose a path that will lead you to it," said Scanlan. His path will take him home to clerk for a judge on the Minnesota Court of Appeals, the same court where he successfully argued a Fourth Amendment case after his first year of law school.

Coralie Colson, the LL.M. student speaker, urged fellow graduates to follow in the footsteps of U.S. Supreme Court Justice

Thurgood Marshall, for whom the LL.M. Class of 2008 is named. "His example of goodwill toward the opposition showed that difference does not always have to be adversarial," she said. Born and raised in France, Colson has worked as a pro bono immigration attorney for individuals seeking refugee status in France. She plans to pursue a career in international arbitration.

Dean Richard Revesz praised the graduates and noted several initiatives that grew out of their "energy, creativity, enthusiasm and leadership." For instance, the Leadership Program in Law and Business, a program that trains students in the intersection of law and business, was the brainchild of Andrew Klein '08. The Alternative Spring Break Program, which funds student travel during spring break to perform law-related community service projects, was spearheaded by Mimi Franke '08 in the wake of Hurricane Katrina. The 2008 class also contributed to the larger New York City community through the Rewarding



Achievement Program, the Unemployment Action Center, the Battered Women's Project and other programs. "You have managed to make a real difference while you've also developed important professional skills," Revesz noted.

Continuing the tradition of giving a class gift for the fifth consecutive year, Alexis Hoag and Vincent Sieber presented a \$131,000 gift from the Class of 2008 to Lester Pollack '57, chair of the Law School's Board of Trustees. (In October, Pollack will become chair emeritus, and Anthony Welters '77 will become chairman. Please see page 108.) The Law School also honored Harvard Law Professor Laurence Tribe and the Honorable Thomas Buerghenthal '60 of the International Court of Justice with honorary doctorate of law degrees at the all-university commencement ceremony at Yankee Stadium. Both made brief remarks, and University President John Sexton addressed the graduates at both ceremonies.

A highlight of the convocation was the hooding ceremony—the distinctive presentation and hooding of each degree candidate. Jordan and Trudy Linfield and trustees Jay Furman '71, M. Carr Ferguson '60, Norma Z. Paige '46, Warren Sinsheimer (LL.M. '57) and Welters hooded recipients of the scholarships they endow. Two graduates from the Class of 2008, Jessica Rosen and Kevin Neveloff, were hooded by relatives and became third-generation alumni.

Revesz reminded the 2008 graduates that they will always be part of the Law School. "This morning you entered this theater as students. This afternoon you leave as alumni," he said. "You join a distinguished community that is eager to welcome you as you make this important transition." □



Singapore Graduates First Global LL.M. Class

The Law School's Singapore Program marked a milestone, graduating its first class. Thirty-nine students from 21 countries across six continents graduated from the 10-month dual-degree program, earning an LL.M. in Law and the Global Economy from NYU and an LL.M. from the National University of Singapore (NUS).

Attending the March ceremony at Singapore's Asian Civilizations Museum, Singapore Minister for Finance and Minister for Education Tharman Shanmugaratnam lauded the program for its "unique content and multinational composition." U.S. Ambassador to Singapore Patricia L. Herbold, Singapore's Chief Justice Chan Sek Keong, and Permanent Secretary to the Ministry of Law Chan Lai Fung also were guests.

One highlight was a speech by Wangui Kaniaru '07 (LL.M. '08) in which she quoted

Sir Thomas Stamford Raffles, a British colonial administrator credited with founding the port city of Singapore: "It would be difficult to name a place on the face of the globe with brighter prospects or more present satisfaction."

"In a world-embracing city," Kaniaru noted, "we have experienced a world-embracing program, and the challenge and opportunity we have been given is to be world-embracing lawyers."

The program grew out of a conversation in 2002 between University Professor and Joseph Straus Professor of Law Joseph Weiler, then-director of NYU's Hauser Global Law School Program, and NUS Dean Tan Cheng Han. Demand for the program has been strong, with about 200 applicants each year. More than 50 students from 24 countries are due to graduate next year.



1 and 2, some of the 2008 graduates; 3 Professor Joseph Weiler; 4 NUS Dean Tan Cheng Han; 5 Simon Chesterman, director of the Law School's Singapore Program; 6 from left, Dean Tan, NUS President Shih Choon Fong, and Minister for Finance and Minister for Education Tharman Shanmugaratnam.

3Ls Look Back—and Ahead



“

I'm going to take away a certain confidence with which to approach the world and all the challenges I face as an attorney and just as a person. And friends, of course.

”



“
I will remember walking into Professor Arthur Miller's first-year class and how he said that all the stories we'd heard were true, that he was going to make our lives hell for six months, that he was the professor and we were the students and to always act like it. And don't ever laugh at lawyer jokes.

”



“

I'm so glad that I've had this chance to live in New York City. It's such a vibrant place, and there's so much going on.

”



“
I think I'm a lot less
intimidated than I was.
I've worked with
intimidating people,
hard workers, demanding
professors for the last
three years. I can say,
'No.' Nothing's going
to happen to me.
I can deal with it.

”



“
When you come here,
you think you know a lot.
But then you meet all these
people from everywhere [and]
realize you know very little.
That was surprising to me—
to see how little I knew before,
and how much I've learned.

”



“
I can now say that
I have a friend in
every single Latin
American country
and in Europe. It
feels good that you
can go to Scotland,
Ireland, Peru or
Chile and know
someone.

”



Convocation Kudos

Proud relations and scholarship donors celebrate with graduates of the Class of 2008 and share in the joy and honor of attaining degrees from New York University School of Law.





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Who's Who

1. Melissa Bogorotty with her fiancé, Elie Sherique (LL.M. '06)
2. Carl Duffield with his partner, Loran Smith Jr. (LL.M. '03)
3. Alejandro Fernandez with his father, Benito Fernandez (LL.M. '90)
4. Rachel Goldbrenner with her father, Ronald Goldbrenner '65 (LL.M. '68)

5. Noam Haberman with his sister, Sharon Haberman-Perry (LL.M. '03)
6. Brian Johnston with his wife, Emily Bushnell Johnston '05
7. Andrew Klein with his father, Law School Trustee Charles Klein '53
8. Adam Kopald with his father, Ned Kopald '64
9. Andrew Kwee with his uncle, Peter Garam (LL.M. '73)

10. Jeremy Lacks and his father, Stanton Lacks '77
11. Alexandra Fidler Metzl with her father, Josh Fidler '80, and her mother, Genine Fidler '80
12. Sarah Morduchowitz with her sister, Daphne Morduchowitz '05, and her fiancé, Alan Nissel (LL.M. '03)

13. Kevin Neveloff with his father, Jay Neveloff '74, and his great-uncle Sanford Pollack '56
14. Carla Piedra with her mother, Janett Fuentealba (LL.M. '75)
15. Laura Rosanna Ricciardi with her sister, Sara Ricciardi '02
16. Nathan Richman with his sister, Emily Richman '03

17. Jessica Lynn Rosen with her father, Philip Rosen '79, her mother, Lois Rosen '79, and grandfather, Nathan Rosen '49
18. Jason Roth with his father, Law School Trustee Eric Roth '77
19. Adam Taubman with his brother, Jarrett Taubman '04

20. Daniel Wachtell and his fiancée, Genevieve Treuille, with his father, Law School Trustee Herbert Wachtell '54
21. Yang Wang with his fiancée, Meng Ni Li (LL.M. '07)
- (Next page)
22. Josh Warren and his mother-in-law, Professor Laurie Malman '71
23. David Young with his father, Edward Young '75



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25



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Scholars and Donors

24. AnBryce Scholars (from back): Donesha Dennis, Charlesa Ceres, Viviana Betancourt and Brandilyn Dumas were hooded by Law School Trustee Anthony Walters '77 and Beatrice Walters

25. M. Carr Ferguson Fellow Lyubomir Georgiev was hooded by Law School Trustee M. Carr Ferguson (LL.M. '60)

26. Furman Academic Fellows (from back): Benjamin Kingsley, Kevin Hickey, Alexis Blane, Kevin Arlyck and Ian Samuel were hooded by Law School Trustee Jay Furman '71 (not photographed: Alexander Guerrero, Catherine Sweetser and Charlotte Taylor)

27. Deborah Rachel Linfield Fellow Ian Vandewalker was hooded by Jordan and Trudy Linfield

28. Norma Z. Paige Scholar Katie Reece was hooded by Law School Trustee Norma Paige '46

29. Starr Foundation Global, RTK and C.V. Starr Scholars (from back): Jan Bischoff, Christopher Turney, Gautam Gandotra, Petr Briza and Tafadzwa Pasipanodya were hooded by Dr. Ernest Stempel (LL.M. '48, J.S.D. '51) and his wife Brendalyn Stempel (not photographed: Neslihan Gauchier)

Not photographed: Sinsheimer Public Service Scholar Ryan Downer was hooded by Law School Trustee Warren Sinsheimer (LL.M. '57)

Making the Grade photographs by Leo Sorel



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Commencement

With Washington Square Park, the usual commencement location, under construction, students traveled north to the Bronx, where they marked their graduation at the 85-year-old Yankee Stadium during its final season before being demolished. Graduates received special baseball caps, individual schools handed out noisemakers and other playful items, and concession stands were open for business.



"The very concept of New York City and the life of our university stand as a rebuke to those who say that...we are condemned to a 'clash of civilizations' in a 'jagged world' of separateness."

.....
President John Sexton's commencement address to the Class of 2008



"As a survivor of the hell which was Auschwitz and Sachsenhausen concentration camps, you have devoted your life to developing law, institutions and understanding among nations and peoples."

.....
Professor Thomas Franck introducing Thomas Buergenthal '60, judge on the International Court of Justice, who was presented an honorary doctorate by President Sexton



A Chat with Ma Ying-jeou

IN A LANDSLIDE VICTORY LAST spring, Ma Ying-jeou (LL.M. '76) was elected president of Taiwan, winning in part on his campaign pledge to finally clean up the government. (In 1996, Ma had been dismissed as justice minister after investigating allegedly corrupt Taiwanese government officials.) Ma also had vowed to support the Dalai Lama's firm stance on Tibetan autonomy, and to strengthen relations between Taiwan and mainland China.

But the political acumen of this former chairman of his Kuomintang Party and mayor of Taipei may be rivaled only by his good looks and appeal: According to one poll, Taiwanese women declared Ma the man other than their husband whom they would most like to have as the father of their children.

Born in Hong Kong and raised in Taiwan, Ma attended the National Taiwan University. Moving halfway around the world in order to continue his legal career, first at NYU and then at Harvard, opened doors for Ma—personal as well as professional. While earning his LL.M. degree at the Law School, Ma became engaged to fellow Taiwanese classmate Chow Mei-ching (LL.M. '76). The couple married in New York and had two daughters. Kelly graduated from Brown University in May; Lesley is a 2005 graduate from NYU's master's program in museum studies and lives in New York City. Chow Mei-ching became a successful lawyer for a Taiwanese bank.

NYU Law Professor Jerome Cohen, who was Ma's professor at Harvard in the late '70s, interviewed the president in his Taipei office just days after his inauguration.

What steps are you contemplating with respect to economic cooperation with the mainland? Direct flights on weekends to the mainland began in July. We are also considering a comprehensive economic agreement covering investment guarantees, avoidance of double taxation and setting standards for high-tech industry.

Have you seen changes on the mainland with regards to human rights? Compare [this spring's] Sichuan earthquake to the Tangshan earthquake of 1976. Back then, the mainland sealed off all information channels and refused aid from the United Nations. Taiwanese planes carrying food to the mainland were shot down by jet fighters. You can see how much they have opened up.

Back in the 1970s, when you were a student at NYU, we couldn't get mainland people to come to the States. And now people from Taiwan and the mainland are on university campuses



Ma Ying-jeou (LL.M. '76), Taiwan's new president, talks about his plans for his country and how NYU Law shaped him. Professor Jerome Cohen interviewed Ma in his Taipei office.

everywhere. One of my campaign promises was to let [mainland] university students come to Taiwan. I would like to see more young people cross the Taiwan Strait so 20 years down the road we will see them as the leaders of their respective societies. Education is the best way to bring the two sides together.

How has the advanced legal education of the kind you got at NYU influenced you as a leader? My studies taught me about the ideas of constitutional democracy—freedom, human rights and rule of law. Those are probably the most important that have influenced me in the days since I left the United States.

As you know, Hong Kong and Tibet have taken unique paths toward autonomy. What formula might work for Taiwan? Beijing has tried to apply the "one country, two systems" formula to Taiwan, but with frustrating results. My election generated the opportunity for the two sides to interact, and Beijing now understands that they must trade with and invest in Taiwan, and let Taiwan have a presence in the international arena.

There was a debate in Taiwan as to whether your wife should leave her 26-year career after your election. She did resign when you became president. What does this mean for Taiwanese society? For the last 26 years, Mei-ching has remained my sounding board without ever stepping into my office. She worked at the International Commercial Bank of China, now Megabank, and even though Megabank has government stocks [toting] less than 50 percent, there's a slight chance that her bank's loan to a government enterprise might present a conflict. We must consider the political realities. Taiwanese society still thinks of the wife of a president as someone who has to give up her career. But think about the hypothetical situation where she is president. Should I resign [from my bank job]? It's a double standard.

Your daughter Lesley, another NYU grad, is also building bridges with the mainland through art. [Lesley has worked with Chinese artist Cai Guo-Qiang on his spring exhibition at the Guggenheim Museum in Manhattan.] My daughter [is] much like my wife: independent and not much interested in politics. She chose to stay in the United States, even during my inauguration.

I hope we'll see you at NYU despite the fact that U.S. policy bars Taiwan's president from making public appearances in the U.S. When I visit countries in Central or South America on diplomatic errands, maybe I can change planes in New York. I will let you know. □

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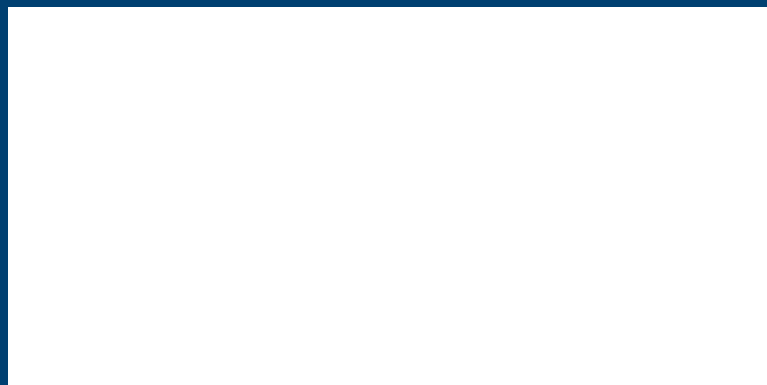
The Wall of Honor

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Wall of Honor, please contact
Marsha Metrisko at (212) 998-6485 or
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sup·port : *verb*

sə-pôrt' \ to promote the interests or cause of

cam·paign : *noun*

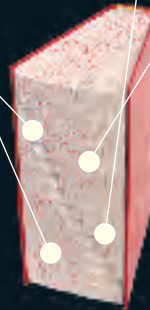
kām-pān' \ a connected series of operations designed to bring about a particular result

par·tic·i·pa·tion : *noun*

pär-tīs'ə-pā,shən \ the act of participating; the state of being related to a larger whole

a·lum·ni : *noun plural*
a·lum·nus

ə-lŭm'nəs \ a person who has attended or has graduated from a particular school, college, or university



Define Success: \$400 million by 2009

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