The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW | 2009

LAWS IN TRANSLATION
Professor Jerome Cohen has spent his life bridging East and West, and promoting the rule of law in China

BEYOND BORDERS
Ten experts debate what's at stake at the intersection of immigration and law enforcement

Between Liberty and Security

IN THE WAKE OF 9/11, SACRED TENETS OF DEMOCRACY ARE BEING CHALLENGED AND A NEW LEGAL DISCIPLINE GRAPPLES WITH THE FALLOUT.

FRIDAY & SATURDAY
APRIL 16–17, 2010
NYU SCHOOL OF LAW

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A Message from Dean Revesz

ONE OF THE INSTITUTIONAL CHARACTERISTICS OF THE NYU SCHOOL OF LAW THAT I am most proud of is its innovative spirit. Our forward-thinking faculty and student body are always trying out ideas. This can manifest itself on a small scale—as when Katrina Wyman structured an environmental law seminar around the recent nonfiction book *Last Flight of the Scarlet Macaw*—or it can loom large. In our cover story, "A Measured Response," starting on page 12, Paul Barrett examines how NYU Law gave shape to a new field—Law and Security—in response to the events of 9/11. In particular, Barrett details the scholarship of six faculty members whose work is central to this field: David Golove, Stephen Holmes, Richard Pildes, Samuel Rascoff, Margaret Satterthwaite '99, and Stephen Schulhofer. (Rascoff, one of the nation's first tenure-track faculty in national security law, just won a Carnegie grant to research the U.S. government's understanding of Islam.) Barrett also reports on the singular leadership of Karen Greenberg at the Center on Law and Security, where she boldly gathers a global mix of police and military officials, judges, investigative journalists, and high-level policy experts as fellows and guests to engage in an informed dialogue—with real-world consequences.

I am especially proud that the emerging fields of Law and Security and Law of Democracy—last year's cover story—were incubated and developed by our faculty. In each year's magazine, we feature an area of law in which I am confident a peer review would say we lead the way among top law schools. Past articles have highlighted our programs in international, environmental, and criminal law, as well as in legal philosophy, civil procedure, and clinical law. To maintain our leadership even during this recession, we continue to invest in expanding our faculty, and I am pleased, in this issue, to introduce five full-time tenured additions. My joy is tempered, however, by the death last May of our esteemed colleague Thomas Franck.

I also greatly admire Jerome Cohen's expertise and foresight; he is profiled by Pamela Kruger beginning on page 30. Back in the 1960s Jerry studied Mandarin in his Berkeley basement, which led to his taking part in many watershed moments over the last four decades as China became a world power—from Nixon's historic trip in 1972 to the 2008 election of Jerry's former student Ma Ying-jeou (LL.M. '76) as president of Taiwan.

Nancy Morawetz '81 gathers nine colleagues and former students on page 24 for a fascinating discussion of one of the thorniest issues of our times: immigration enforcement. Ten years ago Nancy started the Immigrant Rights Clinic, which has inspired influential student casework, launched many careers, and been widely imitated by law schools across the nation.

This fall, Joseph Weiler inaugurates two centers, described on page 39. His powerful vision is to make an academic home on Washington Square for great thinkers of our time, giving them the freedom to explore their ideas. We welcome the distinguished fellows of the Straus Institute for the Advanced Study of Law & Justice and the Tikvah Center for Law & Jewish Civilization to our campus, where they will surely enrich the Law School's intellectual discourse.

The past year has been marked by two galvanizing events: the financial crisis and the presidential election. I am impressed by our alumni serving the public through their roles in the economic recovery and the Obama administration. I want to highlight David Kamin '09 and our back-page subject, Max Kampelman '45. Kamin graduated in January and immediately became special assistant to Peter Orszag, director of the Office of Management and Budget. Kampelman, an ambassador in the Carter administration and Reagan's arms negotiator, could be enjoying a leisurely retirement; instead, he has shown an inspiring determination to bring about the global eradication of nuclear arms. I couldn't ask for better examples of graduates who are devoted to making the world a better place.

RICHARD REVESZ

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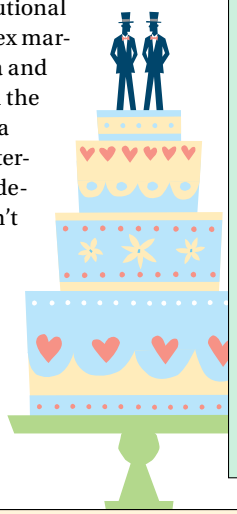
Notes & Renderings

The State of Matrimony

LAST MAY, NEAR THE END OF A YEAR-LONG PERIOD IN which six states legalized same-sex marriage, David Boies (LL.M. '67) teamed with *Bush v. Gore* rival Theodore Olson to challenge Proposition 8, the ballot measure ending gay marriage in California. "This is not something that is a partisan issue," but one of civil rights, said Boies in the *New York Times*.

Not all proponents applauded the bold move. Jennifer Pizer '88, marriage project director for Lambda Legal, told the *Times* the federal suit was "risky and premature" and that a Supreme Court loss could set the cause back decades. But Olson, a Dwight D. Opperman Institute of Judicial Administration board member, countered, "We studied this very, very carefully," adding that it was hard to tell clients, "Why don't you...wait another five years?"

Meanwhile, antidiscrimination law expert Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, weighed in on the sanctioning of same-sex marriage rights in multiple states—including Iowa and Vermont in the span of four days last April—in the *Times*, on NPR, and in other media outlets. In a podcast for the NYU Law Web site, Yoshino interpreted the Iowa Supreme Court's unanimous decision: "A 7-0 decision says that there really isn't an argument we can credit on the other side, and this manifests a movement away from thinking about the same-sex marriage issue as being up for debate and toward the idea that to be against same-sex marriage is like being against interracial marriage." (Listen to the full interview at law.nyu.edu/news/yoshino_podcast_marriage.)



Reframing Sotomayor

In July, the Bickel and Brewer Latino Institute convened an informal discussion regarding the coverage of Sonia Sotomayor's nomination to the U.S. Supreme Court. Sotomayor has strong ties to the Law School: She attended the New Appellate Judges Seminar offered by the Dwight D. Opperman Institute of Judicial Administration in 1998, her rookie year as judge of the U.S. Court of Appeals for the Second Circuit, and she was an adjunct professor of law from 1998 to 2007.

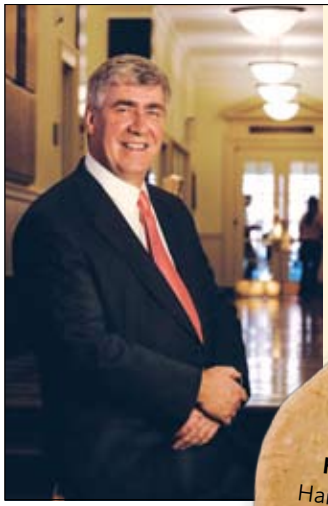
"We want to take stock of how Latinos have helped shape the law in the United States," said the institute's faculty director, Professor Cristina Rodríguez. "A lot of the media focus has been on how Sotomayor would add demographic diversity to the Court, but without a meaningful discussion of the historical contributions of Latinos, including advancements in civil rights."

Rascoff Wins Carnegie

In just his first year in academia, Assistant Professor Samuel Rascoff has won a grant from the Carnegie Foundation of New York. One of 24 Carnegie Scholars who will receive up to $100,000 for research projects to "enrich the quality of the public dialogue on Islam," Rascoff will examine how the U.S. understands Islam, drawing on comparisons to the United Kingdom and the Netherlands, as well as with Cold War-era Sovietology.

Before joining the Law School faculty, Rascoff was the NYPD's director of intelligence analysis and special assistant to Ambassador Paul Bremer with the Coalition Provisional Authority in Iraq. He is the fifth academic from NYU Law to score a grant since the program began in 1999; no other law school has won more than two. Previous winners include professors Noah Feldman (now at Harvard Law School), Stephen Holmes, and Richard Pildes, as well as Aziz Huq, former deputy director of the Brennan Center for Justice.

ILLUSTRATION: DAVID NIEDENTHAL



A Baker's Dozen of Food for Thought

This fall, University Professor Jeremy Waldron delivers one of the most prestigious lectures in the academy, the Oliver Wendell Holmes Lecture at Harvard Law School. It will be the 13th major lecture that Waldron, a legal philosopher, will have given at top universities throughout the world.

"These famous lecture series are great events in academic life, and the universities that sponsor them are understandably anxious to match the quality and reputation of each year's speaker to the high importance of the occasion," said Ronald Dworkin. "It is a wonderful tribute to Jeremy that so many of the best universities have turned to him for that purpose."

October 2009
Oliver Wendell Holmes Lecture
Harvard Law School, Cambridge, MA

SOTOMAYOR: AP IMAGES/WHITE HOUSE

Voting Rights Endure—for Now

When Debo Adegbile '94 appeared before the Supreme Court in April to argue against a constitutional challenge to Section 5 of the Voting Rights Act of 1965, it was the climax of several years' effort to win congressional reauthorization of provisions of the VRA. Adegbile, director of litigation at the NAACP Legal Defense and Educational Fund, had testified in both the House and Senate and made appearances across the country to educate the public and engage in debate about VRA issues.

On the surface, the case was a simple one. A small Texas utility district with an elected board wanted the opportunity to "bail out" of its obligations under Section 5, which requires that certain local jurisdictions with a history of voting rights discrimination seek Justice Department preapproval before changing their voting procedures. Since the district does not register voters, it was deemed ineligible to bail out, and so brought suit to win that right or, alternatively, to overturn Section 5 entirely. The latter possibility made *Northwest Austin Municipal Utility District Number One v. Holder* the most highly anticipated opinion of the last term.

The tone of the oral argument on April 29 led most observers to believe the Supreme Court might declare Section 5 unconstitutional. Adegbile faced skeptical questioning from several justices; one of the most prominently raised questions was whether the mix of covered jurisdictions was now outdated. Many legal analysts predicted a 5-4 decision.

Adegbile, left, with other LDF counsel, emerging after arguments at the U.S. Supreme Court.

The Court surprised both sides on June 22 when it ruled 8-1 to address the case narrowly, leaving Section 5 intact. The Court gave non–voter-registering entities the right to seek bailout relief, but also implied that Section 5's constitutional status might be under threat.

Professor Richard Pildes, whose congressional testimony on Section 5's 2006 reauthorization was quoted in the opinion, said, "Congress had thrown down a gauntlet to the Court by not updating the Act in 2006, and the Court responded in its own more gentle way by essentially throwing the gauntlet back down to Congress and saying the Act is in serious constitutional jeopardy."

Agreeing with Pildes, Professor Samuel Issacharoff, whose law review article on Section 5 was cited in the ruling, said, "If we look at where the problems have taken place in recent elections, Ohio and Florida come to the fore, and neither one is a covered jurisdiction under Section 5."

Adegbile, on the other hand, considers the continued relevance of Section 5 a legislative matter rather than a judicial one: "Where you have a statute that has withstood the test of time and has been a transformative piece of legislation…that system should not lightly be set aside."

West Feliciana Parish, Louisiana, 1963

Acknowledging that no system is flawless, Adegbile said, "Section 5 has never been a perfect metric of all of the places where discrimination is happening, but it's been a very effective one at getting at some of the most entrenched discrimination." He added, "In my work I travel near and far to hear from those folks about whether or not they need Section 5.… Their experience has been such that they understand that the struggle for equality is not done yet."

2009
Tanner Lectures on Human Values
University of California, Berkeley

2008
Space for Thought
London School of Economics, England

2007
Storrs Lectures
Yale Law School, New Haven, CT

2006
Julius Stone Address
Sydney Law School, Australia

2006
Jonathan I. Charney Lecture in International Law
Vanderbilt University Law School, Nashville, TN

2005
F.W. Guest Memorial Lecture
University of Otago Faculty of Law, Dunedin, New Zealand

2005
Daniel Jacobson Lecture
The Hebrew University of Jerusalem, Israel

2004
Robert G. Wesson Lectures
Stanford University, Palo Alto, CA

2001
Kadish Lecture
University of California, Berkeley, School of Law

2000
Sir Malcolm Knox Memorial Lecture
University of St. Andrews, Scotland

1999
Carlyle Lectures
University of Oxford, England

1996
John Robert Seeley Lectures in Social and Political Studies
Cambridge University, England

ARCHIVAL PHOTO: ©BOB ADELMAN/CORBIS

Experts in the House

Who: *Barry Adler, Bernard Petrie Professor of Law and Business*
Where: *House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law*
When: S*eptember 26, 2008*
What: In a hearing titled "Lehman Brothers, Sharper Image, Bennigan's, and Beyond: Is Chapter 11 Bankruptcy Working?" Adler noted that, independent of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, there has been a "sea change" in bankruptcy reorganization for large, publicly traded companies. The shift has been from debtor to creditor control of bankruptcy, with a trend toward more meaningful changes to the organization's management structure as firms attempt to address the roots of fiscal difficulties. The shift has also resulted in a greater number of firms being liquidated, which can be a better solution, Adler said, than a futile capital restructuring that fails to solve the real problem.

Who: *Rachel Barkow, Professor of Law*
Where: *House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection*
When: *July 8, 2009*
What: In the hearing "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC," Barkow gave her take on the structure of the CFPA, which would protect and inform consumers in the complex market of financial services and products. She recommended limiting the CFPA's five-member board to no more than three members of any political party, ensuring that consultation is at the CFPA's discretion and not subject to judicial review, modifying the statute of limitations provision, limiting the ability of agency board members to practice before the CFPA for a certain period following the end of their terms, and giving the CFPA's research unit a mandate to analyze and report on suppliers of financial services and products, as well as regulations imposed on suppliers by other bodies. Barkow also pointed to a lack of clarity regarding the relationship between the CFPA and the president.

Who: *Clayton Gillette, Max E. Greenberg Professor of Contract Law*
Where: *House Committee on Government and Oversight Reform, Subcommittee on Domestic Policy*
When: *September 18, 2008*
What: Gillette testified about the appropriate scope of the federal tax exemption on municipal bond interest. He suggested that the exemption should be limited to those projects that have beneficial consequences beyond the jurisdiction that issues the bonds. Gillette also argued that while projects funded by payments in lieu of taxes (PILOTs) may be desirable for the state or municipality in which the projects are located, the proper availability of the federal tax exemption should depend on other factors. Municipal projects funded by PILOTs have become popular in recent years, and were controversially used in the funding of the new Yankee Stadium. Gillette warned that PILOT financing could be less transparent than financing through direct expenditures, and thus was susceptible to abuse: "These payments permit evasion of the kinds of democratic scrutiny that ensure projects and financing structures that qualify for the federal tax exemption reflect constituent preferences and serve the objectives of the local economy."

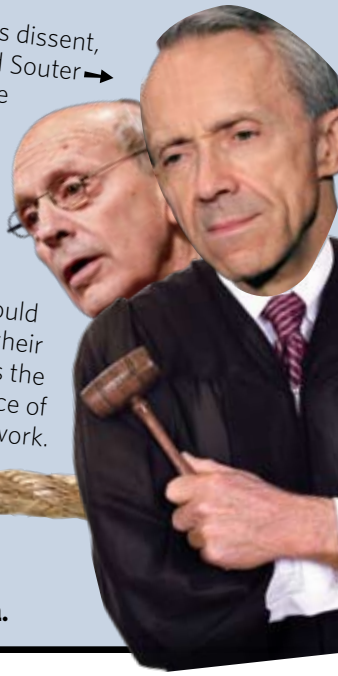
Who: *Linda Silberman, Martin Lipton Professor of Law*
Where: *House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law*
When: *February 12, 2009*
What: Silberman addressed the problem of "libel tourism," in which plaintiffs sue American authors and publishers for defamation in countries where U.S. First Amendment protections do not apply. One such venue is England, where the burden is on the defendant to prove that allegedly defamatory statements are benign. Silberman pointed out that the U.S. has no bilateral or multinational treaty regarding the recognition and enforcement of foreign judgments and called it "curious" that such cases are considered a matter of state, rather than national, law: "As a result, the judgment of a...German or Japanese court might be recognized and enforced in Texas, but not in Arkansas, in Pennsylvania but not in New York." She prescribed a comprehensive federal statute concerning the recognition and enforcement in the U.S. of foreign judgments. On June 16, the House passed H.R. 2765 prohibiting recognition and enforcement of foreign defamation judgments not consistent with the First Amendment; the bill's accompanying report cited Silberman's testimony.

DWORKIN (OPPOSITE): JON CHASE PHOTO/HARVARD NEWS OFFICE

In the majority opinion written by Justice Anthony Kennedy, Pildes's "Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s" from the 2002 *North Carolina Law Review* is cited four times.

In a decision last March, the Supreme Court cited an article by Richard Pildes numerous times in both the majority opinion and two dissents.

In his dissent, Justice David Souter cited the article five more times. And Justice Stephen Breyer, also dissenting, once again cited Pildes. Clearly, one thing the justices could agree on in their 5-4 decision was the significance of Pildes's work.



Pildes V. Pildes

The Court held in *Bartlett v. Strickland* that a part of the Voting Rights Act aimed at helping minorities elect their preferred candidates applies only in electoral districts where minorities make up at least half of the voting-age population.

KENNEDY: GETTY/DAVID PAUL MORRIS/STRINGER SOUTER: GETTY/CHIP SOMODEVILLA/STAFF BREYER: GETTY/CHARLES OMMANNEY/CONTRIBUTOR

A Million for His Thoughts

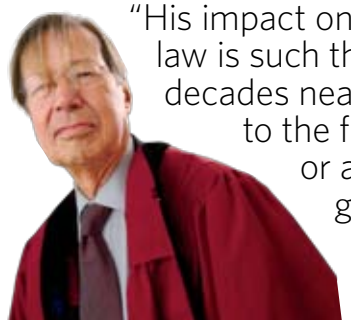
University Professor Thomas Nagel won a 2008 Balzan Prize and one million Swiss francs (roughly $885,000) for his work in moral philosophy. Nagel was honored last December, in part "for the originality and fecundity of his philosophical approach to some of the most important questions in contemporary life."

"Thomas Nagel is one of America's most distinguished living philosophers," says University Professor Samuel Scheffler, once Nagel's student. "He has an uncanny ability to cut to the heart of a complex issue without in any way oversimplifying it."

The Balzan is just the latest in recent honors for Nagel. Last year, Oxford University gave him an honorary doctorate, and the Royal Swedish Academy of Sciences awarded him a Rolf Schock Prize in Logic and Philosophy—and 500,000 Swedish kronor (then roughly $82,000).

A Crimson Feather in His Cap

Legal philosopher and University Professor Ronald Dworkin received an honorary doctorate of laws at Harvard University's 358th commencement on June 4. A graduate of Harvard College and Harvard Law School, Dworkin stood onstage in crimson and black robes as Provost Steven Hyman enumerated the quandaries of legal philosophy that Dworkin has tackled, including the role of morality in constitutional interpretation, the core principles citizens share in a polarized democracy, and how to determine an individual's political rights. Hyman observed:

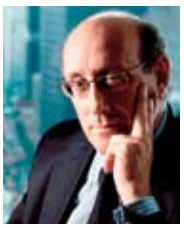


"His impact on the philosophy of law is such that over the past three decades nearly every contribution to the field is either directly or at least indirectly an engagement with his work."

Two Alumni Clear a Painful Docket

When articles are written about how the thousands of victims of the 9/11 terrorist attacks were compensated, there will be one interesting footnote: All but three claimants reached out-of-court settlements with the help of two Law School alumni—Sheila Birnbaum '65 and Kenneth Feinberg '70.

Feinberg, the Obama administration's new "pay czar" overseeing executive compensation for companies receiving federal aid, was the special master of the September 11th Victim Compensation Fund established by Congress 10 days after the attacks as an administrative alternative to litigation. The vast majority—98 percent—of eligible victims and families submitted claims to the fund, and by June 2004 Feinberg had supervised payouts of more than $7 billion to 5,560 claimants.



The 95 remaining victims and families filed suits against the airlines, security companies, and others in the U.S. District Court for the Southern District of New York. That court, in turn, appointed Birnbaum, a specialist in mass torts and a partner at Skadden, Arps, Slate, Meagher & Flom, as mediator. From February 2006 to March 2009, she settled all but three wrongful death and personal injury lawsuits for a total of $500 million.

In her concluding report to Judge Alvin Hellerstein, Birnbaum wrote that many families had not had a chance to "tell the story of their loss." So, she arranged for the families to address airline representatives in face-to-face sessions that were "heart-wrenching and emotionally draining." In Hellerstein's order accepting the report, he praised Birnbaum's "extraordinary work": "She absorbed their losses and their pain with empathy.... She gained plaintiffs' confidence. Without her assistance, most of these cases, in my opinion, would not have settled."

Attorney and Client, Fortitude and Impatience

Ensuring the right to rest one's weary head

Steven Banks '81, attorney-in-chief of the Legal Aid Society, may have developed a new appreciation for Charles Dickens's *Bleak House* after brokering a deal with New York City to shelter the homeless. But unlike the long-running fictional case *Jarndyce and Jarndyce*, this 25-year legal battle had a hopeful ending.

In 1983 the Legal Aid Society filed the primary lawsuit in the matter, *McCain v. Koch*, to obtain better shelter for families. Subsequent lawsuits concerned questions of shelter eligibility and services for the homeless. By 2008, more than 40 court orders were in play. In an attempt to end the quarter-century legal conflict, the city made reforming the shelter system a top priority.

The settlement between the Legal Aid Society and New York City explicitly guarantees the right to shelter and formalizes qualifying standards for shelter, assisting individuals with obtaining necessary documents and helping them find somewhere to go in the event that shelter is denied.

In a September 2008 news conference with Mayor Michael Bloomberg at City Hall, Banks said the hard-won development made this "a historic day for homeless children and their families," adding, "An enforceable right to shelter for homeless children and their families is now permanent, no matter what administration is in office, no matter who is mayor."

Félicitations to Bellamy

In an April 7 ceremony in Paris, Carol Bellamy '68 was made a chevalier in the Legion of Honor in recognition of her service from 1995 to 2005 as executive director of UNICEF, the children's agency of the United Nations. Created by Napoleon Bonaparte, the Légion d'honneur is France's oldest and highest distinction. In recent years, Law School professors Theodor Meron and Ronald Noble as well as NYPD Commissioner Raymond Kelly (LL.M. '74) have also received the medal.

Bellamy has crisscrossed the private and public sectors throughout her career, having worked as a corporate lawyer for Cravath, Swaine & Moore, a managing director at Bear Stearns, a principal at Morgan Stanley, a New York state senator, president of the New York City Council, and director of the U.S. Peace Corps.

French Secretary of State Alain Joyandet presented the medal "to pay tribute to [Bellamy's] commitment to the cause of children all over the world." He praised Bellamy for her "intense and tireless contribution...at the head of UNICEF to fight discrimination against children and advocate for the recognition of their rights."

Bellamy is president and CEO of World Learning, a Vermont-based nonprofit organization that seeks to help Americans become more effective global citizens through study abroad, graduate education, and community projects.

"Being at the head of UNICEF was an honor and a privilege. I can think of no work that is more vital to humanity than ensuring that children everywhere survive their early years and grow up with health, dignity, and peace."

BELLAMY: ©UNICEF/NYHQ2005-0016/NOORANI; CHARLES DICKENS: CHARLESDICKENSPAGE.COM

Opening Argument

"Clients have long hated the billable hour, and I understand why.... The clients feel they have no control, that there is no correlation between cost and quality.... The billable hour makes no sense, not even for lawyers. If you are successful and win a case early on, you put yourself out of work.... That is frankly nuts."

From "Kill the Billable Hour" by Evan Chesler '75, presiding partner at Cravath, Swaine & Moore, and a trustee and adjunct professor at the NYU School of Law, in *Forbes*, January 12, 2009

Plugging Into a Powerful Partnership

A three-year effort by the editors of seven top law journals culminated with the April launch of the *Legal Workshop,* an online magazine featuring ideas found in the law reviews of NYU, Cornell, Duke, Georgetown, Northwestern, Stanford, and the University of Chicago.

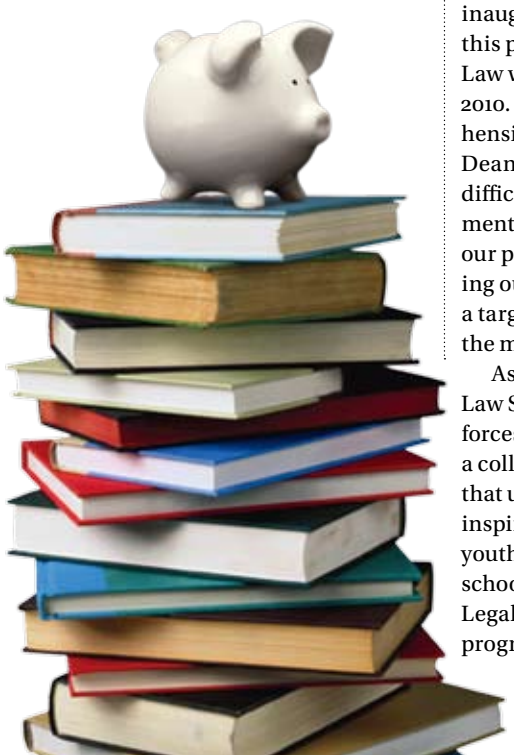
The intent is to provide free legal scholarship in a readable, accessible format, said Matthew Lawrence '09, former managing editor of the *NYU Law Review,* whose efforts were integral to the Web site's launch. The *Legal Workshop* presents short, plain-English articles written by an author whose related, full-length work of scholarship appears in one of the participating law reviews. In June, for instance, Senior Circuit Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit, a visiting professor at NYU School of Law, published an engaging editorial about judicial politics that uses personal experience to illustrate the ideas in a *Duke Law Review* article that he co-authored with Michael Livermore '06, "Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking."

A not-for-profit joint venture, the *Legal Workshop* is operated by current and former student editors. The idea came about at a 2006 meeting of editors in chief of top law reviews who shared how they were struggling to make their individual Web sites viable. Erin Delaney '07 embraced the idea of a collaboration, and the editors of the *NYU Law Review* took the lead in cutting through the legal red tape to form a multistate consortium of private and public entities. "It was a simple vision," said Lawrence, "but it took a lot of hard work to make it happen."

Committed to Diversity

At a time when legal education is moving further out of reach for those with big career ambitions but small financial means, the NYU School of Law has expanded or created outreach and support programs.

Launched through a partnership of the Law School, Harvard Law School, and the Advantage Testing Foundation, the Training and Recruitment Initiative for Admission to Leading Law Schools (TRIALS) is a five-week summer residential program for socioeconomically disadvantaged students that offers rigorous preparation for the LSAT, lectures by legal luminaries, and opportunities to meet with and observe lawyers in the field. Harvard hosted the inaugural year of TRIALS this past summer, and NYU Law will host the program in 2010. "This is part of a comprehensive diversity effort," said Dean Richard Revesz. "In a difficult economic environment, we are not scaling back our programs but are expanding our commitment through a targeted approach that does the most with each dollar."



As part of this effort, the Law School has also joined forces with Legal Outreach, a college prep organization that uses the law as a tool to inspire and prepare urban youth to succeed in high school, college, and beyond. Legal Outreach's four-year program begins the summer before a student's ninth-grade year with an intensive criminal justice course, which was held at NYU this summer; almost every day an alumnus engaged students in discussions on compelling legal issues.

The Law School has also expanded its AnBryce Scholarship Program, founded in 1998 by Anthony Welters '77, chairman of the NYU School of Law board of trustees, and his wife, Beatrice, to provide full scholarships and other support to outstanding students who are the first in their families to pursue a graduate degree. The program, which began with one student per year, is now fully funded and has 30 students—10 per class—annually. "When I was in school, I never considered the need to work a hardship," Welters recently told *Diverse Issues in Higher Education* magazine. "But there were lots of opportunities I missed in law school because of the need to work. My wife and I facilitated these scholarships so that others could take advantage of the full school experience."

"Sor"ing High

Maribel Hernández '10 is one of 31 immigrants or children of immigrants chosen to receive a Paul and Daisy Soros Fellowship for New Americans, which provides tuition assistance for graduate studies.

Hernández is currently a joint J.D./M.P.A. candidate at NYU and Princeton University. A Bickel & Brewer Scholar, she is an articles editor of the *NYU Law Review* and a student advocate in the Immigrant Rights Clinic. She plans to continue her work in immigration law as both a lawyer and a policy advocate. "I want to represent immigrants and at the same time push for humane immigration reform," she said. "I want to help families stay together."

Born in Mexico, Hernández came to Texas with her family when she was 13 years old. She graduated magna cum laude from Harvard University and has interned with the U.N. High Commissioner for Refugees in Mozambique and the Clinton Foundation HIV/AIDS Initiative.

Theodor Meron, Charles L. Denison Professor of Law Emeritus and Judicial Fellow, will be inducted as a fellow into the American Academy of Arts and Sciences in October, along with 211 other fellows and 19 foreign honorary members, including Nelson Mandela, Dame Judi Dench, Colin Powell, Robert Caro, Bono, and Marilyn Horne.

Green Team

Joining forces, law students from the Environmental Law Society and administrators from the dean's office, residential services, operations and administrative services, and student affairs are working together to make sustainability an ingrained part of campus life.

"We see our sustainability efforts and conversations as part of an important culture change at the Law School," says Angela Gius '10, who, along with Joy Sun '10 and Maron Greenleaf '10, were invited to join the NYU Law Sustainability Committee supervised by Lillian Zalta, assistant dean for operations and administrative services.

"We're hoping to make a 'green' lifestyle the norm on campus by ensuring that green habits are easy and accessible, that our facilities—and how we use them—become increasingly energy efficient and waste-free, and that sustainability is a priority in our decisions as individuals and as an institution," says Gius.

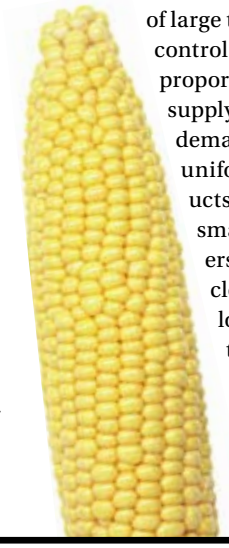
The Law School has already undertaken several significant steps, such as composting waste, improving recycling, reducing energy use, replacing plastics in dining halls, and producing "Green Guides" to educate students, faculty, and staff. Facilities Manager Ken Higgins says the Law School buildings have also been upgraded, switching to low-flow toilets and ditching halogen light bulbs in favor of compact fluorescents.

Ideas flow from all parts of the Law School, says Zalta, who appreciates the passion of the student committee members. "They push the agenda," she says. "They are extremely committed—you don't have to ask them for buy in. They're in."

A Growing Problem: Hungry Farmworkers

A BRIEFING PAPER WRITTEN by members of Law Students for Human Rights and solicited by Olivier De Schutter, U.N. special rapporteur on the right to food and former Hauser Global Visiting Professor, became recommended reading at an international conference held in June.

Aaron Bloom '11, Colleen Duffy '11, Monica Iyer '10, Aaron Jacobs-Smith '11, and Laura Moy '11 spent seven months analyzing the interplay of commodity traders, food processors, global retailers, and fast-food companies to investigate the role played by transnational corporations in the global food supply chain. The research, supervised by Lama Fakih '08, a fellow at the Center for Human Rights and Global Justice, and Professor Smita Narula, CHRGJ faculty director and legal adviser to De Schutter's U.N. mandate, indicated that a shrinking number of large traders control a growing proportion of the supply chain; their demand for cheap, uniform food products pressures poor, small-scale farmers who lack the clout to contest low compensation. As a result, farmers must reduce the wages of their laborers, adversely affecting workers' right to food. The first sentence of the paper puts it starkly: "It is both ironic and tragic that 80 percent of the world's hungry are food producers."



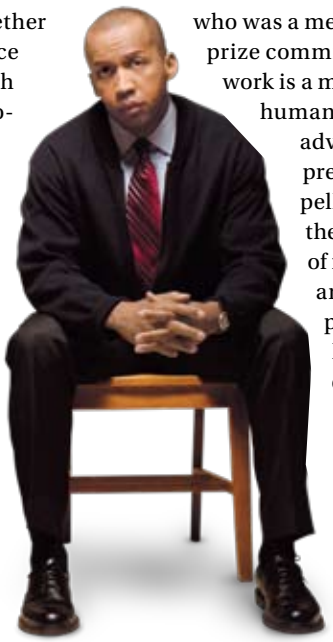
The two-day June meeting was the first of several planned this year that will culminate in a report to the U.N. Human Rights Council. Participants representing agribusiness, farmers, agricultural workers, and NGOs as well as academic experts received a synopsis of the students' paper as one of three documents that formed the basis for discussion. "I really hope that what we created was a foundation for a good conversation there," Iyer, the project leader, said, "and that people who were coming to the conference learned from it and were able to build from that toward actually finding solutions."

A Prized Fighter for Equal Justice

Bryan Stevenson, professor of clinical law and director of the Equal Justice Initiative, has won a 2009 International Justice Prize from the Peter and Patricia Gruber Foundation. The award is given to those who have "advanced the cause of justice as delivered through the legal system." Judge Thomas Buergenthal '60 of the International Court of Justice was one of last year's recipients.

Stevenson is one of two awardees who will each receive $250,000 during a ceremony this fall. The EJI represents indigent defendants, death row inmates, and juveniles who it believes have been denied fair and just treatment in the legal system. This term, the U.S. Supreme Court has agreed to decide the case of EJI client Joe Sullivan, who was convicted of rape at the age of 13 and sentenced to life in prison without the possibility of parole. In December, Stevenson filed a petition in *Sullivan v. Florida* asking the Court to determine whether Sullivan's sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment.

"In securing access to justice for those most in need of protection from discrimination—including, at times, discrimination within the legal system itself—Bryan Stevenson ... assist[s] oppressed minorities in developing the voice and arguments they need to demand equal justice under law," said U.S. District Judge Bernice Donald of the Western District of Tennessee, who was a member of the prize commitee. "[His] work is a model for human rights advocacy and presents a compelling case for the necessity of focusing on and developing public interest law in legal education and practice."



Stevenson's share of the prize money will be contributed to EJI's budget.

IGNACIA MORENO '90
Assistant Attorney General for Environment and Natural Resources Division, Department of Justice*

NIA PHILLIPS '99
Deputy General Counsel for Departmental and Legislative Services, Department of Education

PHILIP WEISER '94
Deputy Assistant Atttorney General for International, Policy and Appellate Matters, Anti-Trust Division, Department of Justice

ERIC P. SCHWARTZ '85
Assistant Secretary of State for Population, Refugees and Migration, Department of State

DAVID KAMIN '09
Special Assistant to Peter Orszag, Director of the Office of Management and Budget

JUDITH HALLE WURTZEL '88
Deputy Assistant Secretary in the Office of Planning, Evaluation, and Policy Development, Department of Education

ALISON NATHAN, 2008–09 ALEXANDER FELLOW
Associate White House Counsel

JON LEIBOWITZ '84
Chair of the Federal Trade Commission

CYNTHIA MANN '75
Director of the Center for Medicaid and State Operations, Department of Health and Human Services

RAYMOND KELLY (LL.M. '74)
Homeland Security Advisory Council

M. PATRICIA SMITH '77
Solicitor of the Department of Labor*

MIRIAM SAPIRO '86
Deputy U.S. Trade Representative*

BRUCE ORECK (LL.M. '80)
U.S. Ambassador to Finland*

SETH HARRIS '90
Deputy Secretary of Labor

Painting the White House Violet

LOUIS FREEH (LL.M. '84)
Homeland Security Advisory Council

LAURIE MIKVA '83
Member, Board of Directors, Legal Services Corporation

The historic election of the first African American to be chief executive of the United States is also the return of a lawyer—and law professor—to the White House. In the first six months of the new presidency, more than a dozen Law School alumni said, "Yes, I can!" and have been nominated, confirmed, or appointed to a wide variety of influential roles in the Obama administration.

*Awaiting confirmation as of July 30, 2009

Prepping and Priming:

Faculty and alumni, and the agency review teams they served on during the transition

PROFESSOR CYNTHIA ESTLUND
Catherine A. Rein Professor of Law, National Labor Relations Board

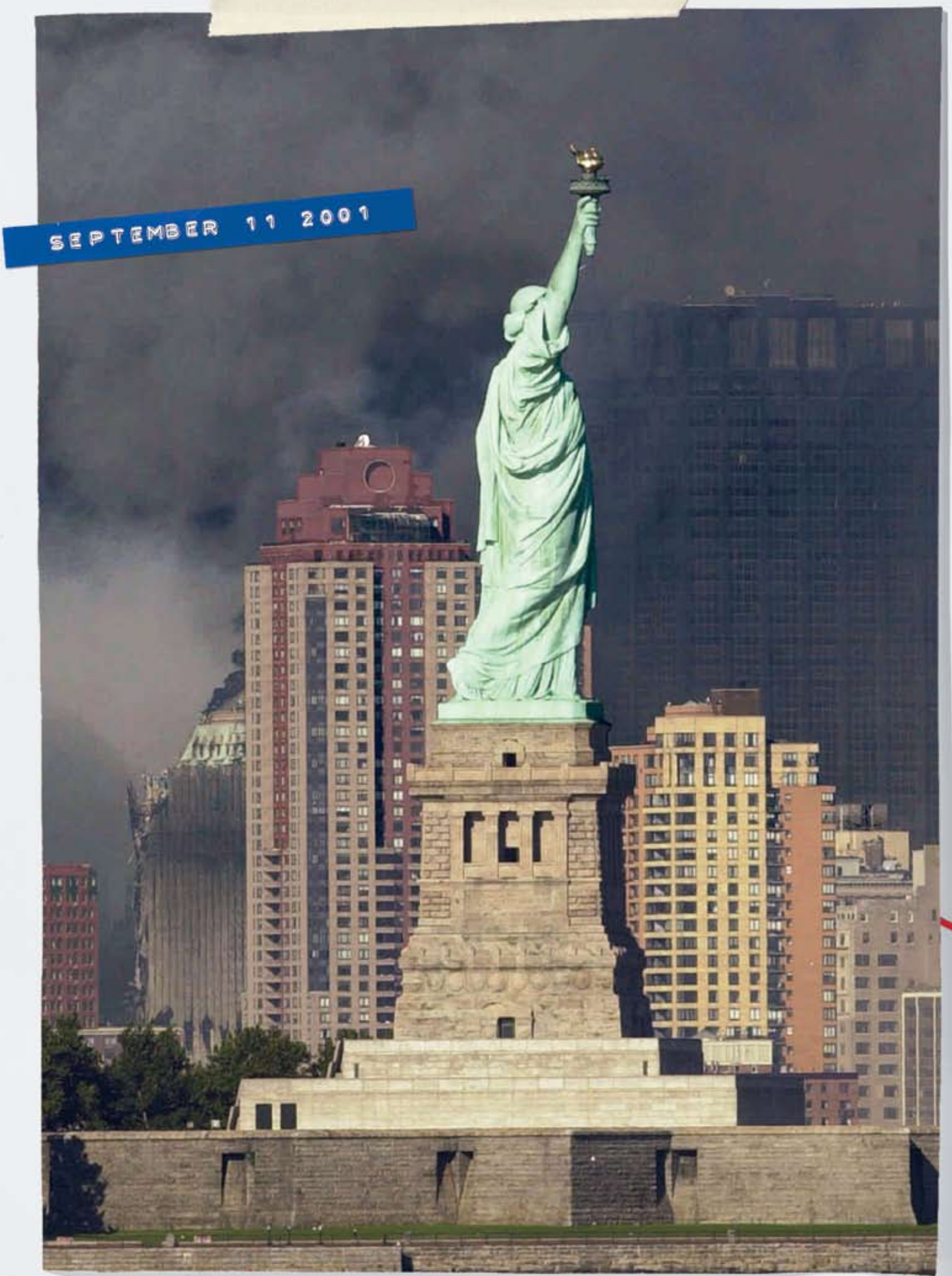
ADERSON FRANCOIS '91
Commission on Civil Rights

PAMELA GILBERT '84
Consumer Protection & Safety Commission

KEITH HARPER '93
Department of the Interior and Indian Gaming Commission

ALAN HOUSEMAN '68
Legal Services Corporation

Also, Obama administration members **HARRIS, MANN, SCHWARTZ, SMITH,** and **WEISER** served on the transition team.



SEP 11, 2001: AP PHOTO/DANIEL HULSHIZER; OCT 2001: AP PHOTO/CHRISTOPHER MORRIS/VII; OCT 7, 2001: AP PHOTO/RON HAVIV/ VII; OCT 26, 2001: AP PHOTO/RON EDMONDS

A Measured Response

BY PAUL BARRETT

A scant two weeks after the World Trade Center was destroyed by terrorists, Supreme Court Justice Sandra Day O'Connor stood on a construction site some 20 blocks away from the smoldering ruins to preside over the groundbreaking for a new academic building at the NYU School of Law. O'Connor admitted she was "still tearful" and shaken after having viewed the devastation at ground zero. But she put on a shiny construction helmet, grasped a ceremonial shovel, and gamely scraped at some Greenwich Village dirt. After helping mark the beginning of what is now Furman Hall on Sullivan Street, O'Connor spoke with striking prescience about how 9/11 would change American life.

She counseled the aspiring lawyers and legal scholars in the audience to remember the basic tenets of American democracy as they responded to seismic shifts in the legal landscape. "We're likely to experience more restrictions on our personal freedom than has ever been the case in our country," O'Connor said, reminding legal professionals of their obligation to protect the rule of law. She urged politicians to move cautiously after a disaster that "will cause us to reexamine some of our laws pertaining to criminal surveillance, wiretapping, immigration." And she predicted, "Lawyers and academics will help define how to maintain a fair and just society with a strong rule of law at a time when many are more concerned with safety and a measure of vengeance."

Anticipating that momentous cases concerning presidential and judicial authority during national emergencies would find their way to the Supreme Court, O'Connor, who retired in January 2006, then posed a series of questions that continue to frame public discussion about terrorism (and would make for a very respectable law school exam): "First, can a society that prides itself on equality before the law treat terrorists differently than ordinary criminals? And where do we draw the line between them? Second, at what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that the legislation provides?"

As the legal system grappled with those questions, a new discipline developed, known as Law and Security. The form it has taken at NYU is particularly expansive, welcoming not only legal scholars and practitioners but also investigative journalists, policy and government wonks, and police and military officials sharing information in ways that have benefited all parties. Here they have three primary outlets to practice, study, and exchange ideas: (1) the NYU School of Law Center on Law and Security, a trailblazing internationally focused forum—something akin to an old-style intellectual salon updated for the life-and-death issues of the 21st century; (2) the scholarship and classrooms of about a dozen faculty, including, notably, David Golove on the law of war, Stephen Holmes on the rule of law, Richard Pildes on rights during wartime, Margaret Satterthwaite '99 on extraordinary rendition, Stephen Schulhofer on police antiterrorism tactics, and Samuel Rascoff, one of the nation's first tenure-track professors of national security; and finally, (3) the clinical and advocacy work of other Law School centers, such as the Center for Human Rights and Global Justice, which oversees the International Human Rights Clinic, the Brennan Center for Justice, and the Center on the Administration of Criminal Law.

Through its faculty and the centers, the NYU School of Law has helped shape the national security debate, says New York City Police Commissioner Raymond Kelly (LL.M. '74). "NYU Law has provided an important platform for an examination of crucial issues ranging

"Lawyers and academics will help define how to maintain a fair and just society with a strong rule of law at a time when many are more concerned with safety and a measure of vengeance."

U.S. Supreme Court Justice Sandra Day O'Connor, Sep 28, 2001

from constitutional safeguards to the ongoing threat posed by terrorists," he says. "The Law School's faculty and other experts involved with the Center on Law and Security are valued resources for critical thinking on the most pressing security challenges of the day."

THE DEVELOPMENT OF LAW AND SECURITY AT THE NYU School of Law began with a desire to create something meaningful out of the stunning destruction. "Everyone was shocked, shattered, demented by getting up in the morning and watching 3,000 people murdered right next door," recalls Stephen Holmes, Walter E. Meyer Professor of Law. "So there was an attempt to come to grips with it, to think about it: What happened? How should we respond?"

The most immediate answer was to create the Center on Law and Security. Dean Richard Revesz turned to four faculty members whose specialties recommended them for the task: Holmes, a political philosopher; Golove, an authority on international law; Pildes, a constitutional law scholar; and Noah Feldman, an expert on Islamic law who now teaches at Harvard Law School. In turn, they recruited Karen Greenberg to help them draft a proposal. A former Soros Foundation/Open Society Institute executive, she had founded a program that opened NYU campuses in Prague and London.

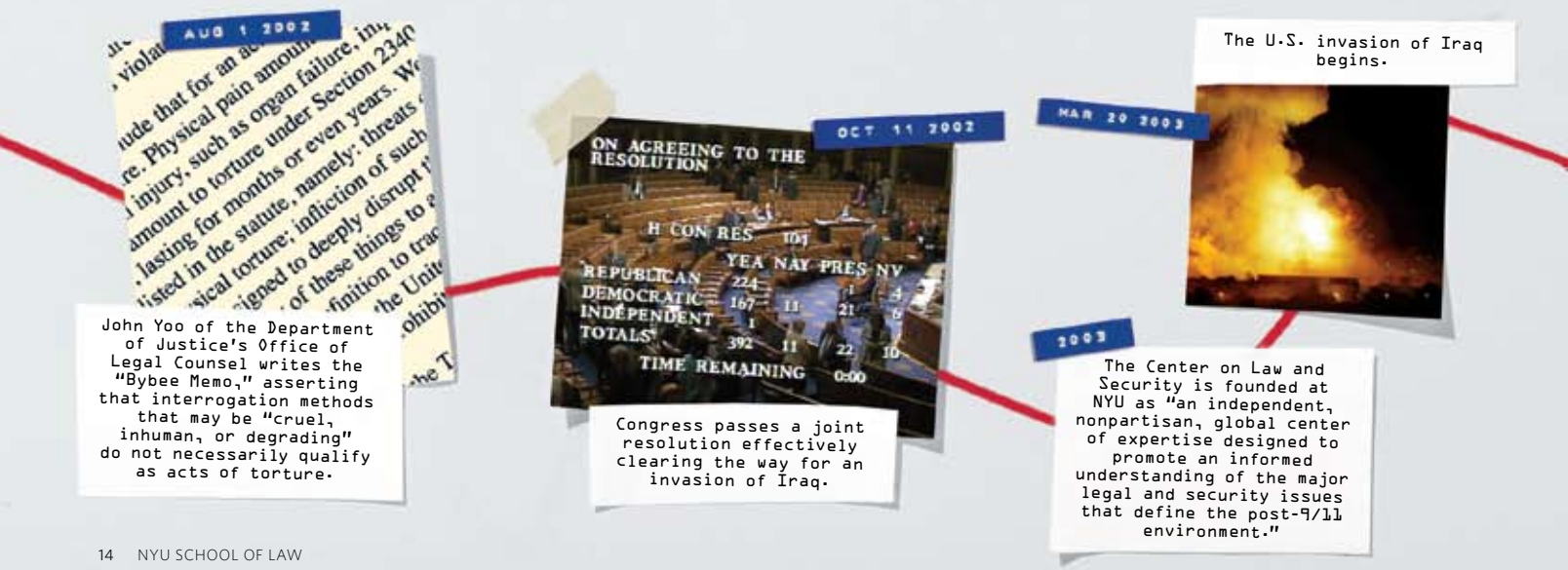
Greenberg suggested that the Law School start a practical-minded center within the ivory tower. Her goal: "bring people with policy-making responsibilities and academic credentials together, so that officials would have a think tank of their own to rely upon, and academics and experts could apply their skills to a realistic set of concerns." She also wanted to bring journalists into the conversation "because they had done their homework. They knew about Osama bin Laden and al Qaeda. They understood how to effect a constructive dialogue between Muslim communities and the West." In Greenberg's opinion, greater communication among scholars, reporters, law enforcement officials, and policy makers was essential for national security.

The proposal was greenlighted, and Greenberg was appointed executive director, with Feldman, Golove, Holmes, and Pildes named faculty advisers. The center immediately entered into the public discourse through the articles and books the scholars published on such subjects as wartime effects on the rule of law, the Constitution, civil liberties, and separation of powers. (See the timeline, starting on page 13.) Feldman was tapped to be a senior constitutional adviser to the Coalition Provisional Authority in Iraq. His opinion pieces and feature articles for the *New York Times* and the *Wall Street Journal*, influenced by his role helping to craft a new Iraqi constitution, helped to raise the profile of the CLS. "The center became a focal point for discussion of counterterrorism and security for both scholars and practitioners," says Rascoff, now a CLS faculty adviser who in 2003 was a special assistant to Ambassador Paul Bremer in Iraq. However it was the center's response to reports that the U.S. was torturing prisoners of war that—for a broader audience—put it on the map.

In early 2004, only months after the CLS officially opened its doors, the Abu Ghraib scandal broke. Leaked photographs of the abuse of Iraqi detainees sparked widespread concern about whether tactics in the American war on terrorism had come to include torture. Greenberg's aggressive networking among journalists on the national security beat paid off as reporters—and soon thereafter, lawyers and human rights activists—began to request information about U.S. interrogation methods. As government whistle-blowers and enterprising journalists gradually pried classified memoranda from locked drawers at the Justice Department and Pentagon, the center diligently collected copies, amassing a lengthy paper trail of how the Bush administration justified detention policies that appeared to violate U.S. and international law. There was no other place where skeptics of Bush policies could do such efficient one-stop shopping for internal accounts of what Vice President Cheney famously termed "the dark side."

Among those who approached the center was Joshua Dratel, a New York criminal defense attorney representing a detainee held at the Guantánamo Bay naval base in Cuba. He collaborated with Greenberg in editing the comprehensive collection of primary sources they provocatively titled *The Torture Papers: The Road to Abu Ghraib* (2005). Anticipation for the book was high. Senator Patrick Leahy used an advance copy to shape his stiff questioning in the attorney general confirmation hearings of Alberto Gonzales in January 2005. The *New York Times* later described the monumental 1,284-page collection as "necessary, if grueling, reading for anyone interested in understanding the back story to those terrible photos from Saddam Hussein's former prison, and abuses at other American detention facilities."

Continued on page 17



DAVID GOLOVE

Law of War

While the Center on Law and Security was formed in reaction to 9/11, David Golove takes a much longer view. In a paper-in-progress, "The Case for Incorporating Global Justice into the U.S. Constitution," Golove, Hiller Family Foundation Professor of Law, brings 150-year-old concepts of how "civilized nations" ought to conduct themselves into the 21st century. The concepts are found in the Law of War, a collection of understandings among nations about the constraints on armed conflict that includes the Geneva Conventions, which forbid the torture of prisoners of war.

"The United States is a civilized nation," Golove explains. "It recognizes the obligations of civilized behavior, even to its enemies, and that recognition should have a constitutional dimension." These obligations apply both to the president and Congress, he claims.

The roots of the Law of War are found in guidelines Abraham Lincoln imposed on the Union Armies during the Civil War, and in arguments his administration made to justify such extreme exercises of executive authority as the naval blockade of Southern ports and the denial of habeas corpus protection for allegedly disloyal citizens. In each instance, Lincoln and his aides contended that he acted properly "within the rules of civilized warfare," Golove recounts in his 2003 paper "Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach."

The Bush administration adopted a different posture: that the president possesses inherent power to defy the law to protect national security. After President Bush added an ambiguous signing statement to 2005 legislation outlawing torture, Golove played a leading role in challenging it. Golove told the *Boston Globe:* "The signing statement is saying, 'I will only comply with this law when I want to, and if something arises in the war on terrorism where I think it's important to torture or engage in cruel, inhuman, and degrading conduct, I have the authority to do so.'" Later, officials confirmed that this was indeed the White House position.

Golove's analysis doesn't boil down simply to What Would Lincoln Do, however. "Lincoln did make a radical—and doubtful—claim of executive power," the scholar says. "But that claim provides no precedent for the kind of powers that the Bush administration has asserted." It's critically important, he says, that Lincoln told Congress what he had done and promised to abide by lawmakers' judgment on the legitimacy of his actions. "In contrast, the Bush administration acted secretly and withheld from Congress and the public the legal theories on which he was acting," Golove says. "Moreover, the Bush administration has repeatedly claimed that the radical powers [Bush] assert[ed] are not only inherent executive powers but are exclusive powers, and that Congress is without any authority to override his decisions. These are hugely significant differences." —*P.B.*

OCT 11, 2002| AP PHOTO/APTN; MAR 20, 2003: AP PHOTO/JEROME DELAY, FILE

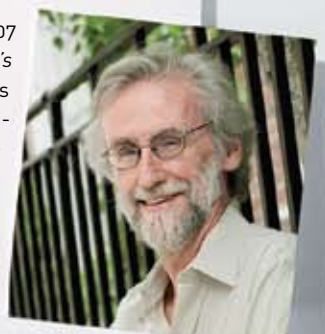
STEPHEN HOLMES

The Rule of Law

A distinguished political theorist, Stephen Holmes, Walter E. Meyer Professor of Law, has spent decades thinking about the paradoxes of democracy and liberalism. In his 1995 book, *Passions and Constraint: On the Theory of Liberal Democracy*, he argued that individual liberty and tolerance of diversity tend to thrive only under active government—but that publicly accountable decision making must be structured and constrained by formal rules to facilitate collective rationality and self-correction. Rules and procedures, in other words, can protect important freedoms.

When his attention turned to counterterrorism after 9/11, Holmes naturally considered the role of rules in the promotion of security. Characteristically, his analysis took unconventional turns. In the prestigious Jorde Lecture he delivered in April 2008 at Yale University, he noted that in hospital emergency rooms, nurses and doctors spend precious seconds following protocols to ensure, for example, that a Type O patient receives only Type O blood. The ER teaches an important lesson about responding to the disorienting challenge of terrorism, Holmes says. By following rules—rather than trying to evade them—officials can diminish the chance of error, build political and public support for controversial policies, and highlight collateral dangers created by the best of intentions.

Throughout his writing, Holmes challenges the Bush administration's argument that the need for flexibility in combating terrorism justifies suspending well-established rules, such as the Constitution's instruction that Congress shares war-making authority with the president, or the judiciary's system for ensuring that prisoners receive a hearing under the habeas corpus statute. Robust congressional review of the reasons for war—as opposed to a rubber stamp based on contrived evidence of weapons of mass destruction—could have prevented what most Americans now see as a misguided adventure in Iraq, he says. In an April 2006 essay in *The Nation*, "John Yoo's Tortured Logic," Holmes tallied the casualties he attributes to the once-secret legal memoranda by the former Justice Department lawyer who advocated virtually unlimited presidential power to fight terrorism. "By dismantling checks and balances, along the lines idealized and celebrated by Yoo," Holmes wrote, the Bush administration "certainly gained flexibility in the 'war on terrorism.' It has gained the flexibility, in particular, to shoot first and aim afterward. It has acted on disinformation and crackpot theories and utopian expectations that could perhaps have been corrected or moderated if traditional decision-making protocols had been respected."



Expanding on this idea in his 2007 book, *The Matador's Cape: America's Reckless Response to Terror*, Holmes urged a reassertion of judicial and legislative oversight—a respect for the rule of law: "Law is best understood not as a set of rigid rules but rather as a set of institutional mechanisms and procedures designed to correct the mistakes that even exceptionally talented executive officials are bound to make."—*P.B.*

Policy Incubator

For some NYU Law students, the post-9/11 interest in national security has aligned perfectly with their passions. Take Daniel Freifeld '08. A seasoned globetrotter who speaks Turkish, French, and conversational Arabic, Farsi, and Spanish, Freifeld had worked at the World Bank and Defense Department before he matriculated, already aware of the Center on Law and Security. He got involved with the center as a 1L, rising to his current position as its director of international programs. "I can't think of an organization that's been more effective in shaping the counterterrorism debate," Freifeld said. "A lot of changes in the broader policy community would not have been possible but for the introductions we made, the events we put on, the research we did."

Freifeld has run a project on European counterterrorism for the center, and after taking a break to be a foreign policy staffer on Hillary Clinton's presidential campaign, he has been laying the groundwork for a series of roundtables on energy and geopolitics in the Persian Gulf. "I literally dedicated my Law School career to CLS. It was the ideal way to apply my legal education to the outside world."

Another of Freifeld's projects was heading the *Terrorist Trial Report Card*, taking the reins from its first research director, Andrew Peterson '06. Now a member of CLS's board of advisors, Peterson began working with the CLS at its inception: "I was very interested in national security and terrorism, so the mission of the center was appealing to me."

The *Report Card*, a comprehensive summary of U.S. terrorism cases, is a herculean effort to construct a track record on government prosecutions often shrouded in secrecy. Culling through news reports and court records to obtain reliable statistics on terrorism trials, students compiled a database that has become an invaluable tool for assessing competing claims about the efficacy of counterterrorism prosecutions.


Freifeld


Peterson


Laguardia

The hands-on experience Peterson gained at CLS helped him secure internships with the Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency's Office of General Counsel, where he now works as an attorney. "The center provided not only an incredibly deep but also a relatively broad exposure to all the different types of policy decisions and legal issues in the counterterrorism world. Right after 9/11, the discussion of the war on terror was still relatively simplistic," Peterson says. "The center was critical in helping to bring a much more complex analysis, and by doing that it informed policy going forward."

The center's current research director, Francesca Laguardia '07, is the latest head of the *Report Card*, whose last edition is due out this fall. Weighing in at quadruple the pages of previous editions, this final report will crunch eight years of data to sum up "what we learned...with a much more detailed and in-depth analysis of how strategy and our actions have changed," she said. Laguardia, a former investigative analyst in the Rackets Bureau of the New York County District Attorney's Office, is currently working toward a Ph.D. in law and society from NYU. She is also steering the center's latest mammoth undertaking. The *Accountability Papers* will "collect everything that someone would want to know as far as issues of accountability in the Bush administration," dealing with matters such as interrogation tactics, surveillance, and justifications for the Iraq war.

Laguardia's work helps her to think about politically freighted issues from a more neutral stance, she said, and she pointed to the importance of the center's efforts to create dialogue: "We help Law and Security actors talk to each other and learn from each other when they would not otherwise have the opportunity to do so. The center performs a vital role in making that kind of communication possible, and also gets the public involved in the conversation. That's a fundamental role that the center fulfills in a way I'm not sure any other institution is doing." —*Atticus Gannaway*

MAY 1 2003

President Bush declares an end to major combat operations in Iraq after donning a flight suit and landing with great fanfare aboard the USS *Abraham Lincoln*.

2003

"...in exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law."

Publication of "Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach" by David Golove in the *NYU Journal of International Law and Politics*.

JAN 2004

Publication of "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime" by Richard Pildes and Samuel Issacharoff in *Theoretical Inquiries in Law*.

"American courts have neither endorsed unilateral executive authority, nor...defined...the substantive content of rights in [times of crisis]."

Terrorists bomb four Madrid commuter trains, killing 191 and injuring more than 1,700.

MAR 11 2004

MAY 1, 2003: AP PHOTO/J. SCOTT APPLEWHITE; MAR 11, 2004: AP PHOTO/PAUL WHITE; JUL 7, 2005: AP PHOTO/APTN

The CLS soon gained a reputation as a leading critic of government security policies. In February 2005, Greenberg and her staff began producing the *Terrorist Trial Report Card* (see story on opposite page), a widely cited print and online periodical that assesses the prosecution of terrorism-related crime in the United States. The *Report Card* has helped fuel a lively debate over the Justice Department's policy of invoking the threat of terrorism when indicting hundreds of Muslim Americans on garden-variety financial fraud and immigration charges. In a January 22, 2009 editorial, the *Chicago Tribune* cited the center's research in arguing that the Obama administration needs to ensure that terrorism suspects are afforded better legal representation.

More recently, the center has begun analyzing terrorism trials in Europe. Among the insights gained from comparison to U.S. strategies: European police tend to spend more time observing suspects before making arrests, sometimes yielding more concrete evidence, and some European judges have shown pronounced reluctance to uphold convictions where there is evidence that alleged terrorists have been questioned harshly while in American custody.

This sharing of information, the center's trademark, occurs not only in its publications, but through conferences, open forums, and other live events where members of the faculty, students, and the community at large can voice their thoughts to guests to whom the public may otherwise not have ready access. At the December 2008 forum "After Torture: Discussing Justice in the Post-Bush Era," cosponsored by *Harper's Magazine*, Burt Neuborne argued passionately for civil litigation, alleging various abuses of power by top Bush aides. "If we're serious this time [about upholding the Constitution], we ought to go after the people who made the policy," Neuborne, Inez Milholland Professor of Civil Liberties, told an overflow audience in Lipton Hall. Retired Major General Antonio Taguba, another panelist, seemed to agree in principle. Taguba, who before his retirement from the Army in 2007 led a Pentagon investigation of the Abu Ghraib abuses, pointed out that while low-level soldiers had been punished, those higher up in the chain of command have largely escaped discipline. "We must have a single, uniform standard [for the treatment of military detainees overseas]," Taguba asserted. "We deserve clarity. I'm speaking for the troops out there, the 19-to-24-year-olds who are out there doing God's work."

In further pursuit of strategic cross-pollination, the CLS hosts an annual summer symposium that was specifically created to give European and American security officials a neutral place to share ideas. A group of about 20 counterterrorism authorities—including Michael Sheehan, the former deputy police commissioner responsible for counterterrorism in New York, and Peter Clarke, the former head of the antiterrorism branch of Britain's New Scotland Yard—convene at NYU's Florence, Italy, campus to speak candidly about their work. Although the discussions are off-the-record, they have sometimes sparked important public debate. In one notable instance at the June 2006 conference, Baltasar Garzón, Spain's

[redacted] "I come from the country of the Inquisition.... We had to learn from experience that torture, and mistreatment and degradation, do not work as investigation techniques." [redacted]

Spanish Magistrate Baltasar Garz□n in the Jun 4, 2006 *New York Times*, calling for the closing of the Guant□namo prison

investigative magistrate and a former distinguished fellow at the center, denounced the detention center at Guantánamo Bay. His call to close Guantánamo crystallized growing European disillusionment with American policy.

While these examples draw a portrait of an organization that was, during the Bush administration, opposed to government policies, the CLS has made concerted effort to give all sides an equal platform. Daniel Benjamin, a former senior fellow at the Brookings Institution and a past member of the center's outside board of advisers, notes that one of CLS's great contributions was to create a venue for civil disagreement, even as it adopted a skeptical stance toward the Bush administration's policies. Interviewed before he joined the Obama administration State Department as coordinator for counterterrorism policy, Benjamin called Greenberg "the doyenne of counterterrorism," praising her ability to "bring people together, people of such diverse views that you're astonished to find them in the same place: senior officials of the Bush administration together with the human rights lawyers who are fighting them tooth and nail in the courts; strong advocates of the 'war paradigm' in the struggle against terrorism and the scholars and journalists who have attacked them relentlessly; and American and European jurists and policy makers who are on opposite sides of issues such as Guantánamo, rendition, coercive

Continued on page 19

JAN 26 2005

Publication of *The Torture Papers: The Road to Abu Ghraib*, co-edited by Karen Greenberg.

FEB 2005

CLS issues its first *Terrorist Trial Report Card*, which notes that at the time of publication, courts had convicted only one person—"Shoebomber" Richard Reid—of a direct act of terrorism.

FEB 17 2005

With Margaret Satterthwaite standing behind him, U.S. Representative Edward Markey introduces the Torture Outsourcing Prevention Act to ban extraordinary rendition. The bill is supported by research and reports from the Law School's Center for Human Rights and Global Justice.

JUL 7 2005

London public transit is bombed by terrorists; 56 killed, approximately 700 injured.

Rights in Times of Crisis

RICHARD PILDES

In his Law and Security scholarship, Richard Pildes, Sudler Family Professor of Constitutional Law, searches for alternatives to constitutional extremes. Consider his 2004 article, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime," in which Pildes and co-author Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, chart a course at odds with both the liberal advocacy of individual rights and the neoconservative ideal of judicial deference to presidential authority. The authors survey Supreme Court actions during wartime and surprisingly conclude that the justices have checked executive authority more often than conservatives recognize, but not through the individual-rights approach that liberals often urge. The Supreme Court has played this role by focusing on the procedural question of whether the president has obtained congressional approval for his actions.

The notorious internment of Japanese Americans during World War II offers a provocative comparison to today's controversies over "enemy combatants." There is now broad consensus that the forced relocation of U.S. citizens of Japanese descent sprang from panic and bigotry rather than real danger. The Supreme Court of that era shares in the notoriety because of its 1944 ruling in *Korematsu v. United States* deferring to the authority of President Franklin D. Roosevelt and Congress. But largely eclipsed in constitutional memory is *Ex parte Endo*, wherein a unanimous court held that the continued detention of Japanese Americans was illegal. The justices distinguished between the two actions: first, the emergency military roundup of Japanese Americans, and, second, the political judgment to detain the internees for years without any proof of disloyalty. "On the day the two decisions were handed down together, the most immediate practical matter at stake was whether the detained Japanese would be released," the authors note. "Under *Endo*, they were." As far as Pildes is concerned, the high court demonstrated sufficient backbone "to resist executive branch actions that, at most, rested on political and policy, rather than military, judgments."

Pildes suggests that by acting in this fashion, the judiciary can impose limits on executive power while leaving latitude for military decision-making. The Supreme Court has done just that, insisting that the conduct of the war on terrorism is not insulated from judicial oversight. The justices have upheld preventive detention of suspected terrorists at Guantánamo while insisting that detainees deserve to be tried under procedures approved by Congress. When the high court struck down the military commission system in 2006, Congress responded by passing legislation specifying how the commissions ought to work. In Pildes's view, the judiciary has appropriately continued its role of channeling decisions to the "political branches," while invalidating executive actions taken without legislative approval. *—P.B.*

Regulating Terrorism

SAMUEL RASCOFF

In the wake of 9/11, New York City built an unprecedented counterterrorism force of its own: 1,000 committed officers, an Intelligence Bureau, and 10 officers dispatched as full-time liaisons to police departments in the Middle East, Europe, and Southeast Asia. The elaborate program turned the joke about the mayor of New York City having a foreign policy into a "literal truth," observes Assistant Professor of Law Samuel Rascoff, who ran the city's counterterrorism intelligence desk for two years before joining NYU Law in 2008.

As a scholar, Rascoff has been considering "the paradox of national security federalism." We tend to think of terrorism as a national and global challenge, one necessarily countered by agencies and officials in Washington. New York's unique response to 9/11, however, argues for local control over key counterterrorism functions. As Rascoff has observed, "Local departments...'see' the threat more clearly than their national counterparts: officers...know their [mainly urban] terrain, speak relevant languages, and are able to leverage their status as... peacekeepers within the community to useful effect."

Embracing this position leads Rascoff to reject the debate over whether counterterrorism is a function of the criminal justice system or a form of warfare. "Crime, unlike terrorism, happens every day and does not threaten the political order," he explains. But neither is counterterrorism warfare. "Wars end, but counterterrorism will require a sustained effort over at least a generation." Instead Rascoff posits counterterrorism as a form of risk regulation, something akin to controlling pollution or ensuring drug safety. To preempt mass violence, government must begin by getting better at intelligence gathering and analysis, he says, using a wide range of "risk assessment" tools. It will then be in a position to engage in various "regulatory interventions," from softer approaches (as when officials reach out in a conciliatory way to local Muslim leaders) to more hard-edged techniques, as in the case of the NYPD's periodic deployment of scores of vehicles, lights flashing and sirens blaring, to send a message that potential targets will be difficult to attack.

Counterterrorism as risk regulation also suggests a need for rigorous balancing of relative dangers in deciding whether limited resources ought to be directed to all 50 states or concentrated in those cities and around infrastructure like nuclear plants that present the most pronounced risks. Finally, all branches of government must play more of an oversight role in making sure that terrorism regulation obeys the rule of law. "We need a model of counterterrorism law that is sustainable, that treats the threat in the way of a chronic health issue," he concluded, "not an acute problem that can be cured with a rapid surgical intervention." *—P.B.*

JUN 4, 2006: AP PHOTO/HUMBERTO TRIAS JR.

interrogation, and the like." Among Benjamin's fellow board members was Viet Dinh, a senior Justice Department official during the Bush administration who teaches at Georgetown University Law Center. "The exchange has been vital, and just about everyone comes away a bit better informed and even wiser," says Benjamin.

AFTER 9/11 THERE WAS BOUND TO BE A SURGE OF SCHOLARLY attention to the sort of legal questions posed by Justice O'Connor: Would the rules of a war on terrorism be different from those of a conventional war? What lessons could be learned from the constitutional conflicts that arose during Vietnam, World War II, or even the Civil War? (See the dossiers starting on page 15.)

"Although people liked to pretend that they knew all of this on September 12, 2001, that just wasn't true," observes Richard Pildes. Law and security issues seeped into classes on constitutional and criminal law with fresh problems related to surveillance, privacy, and the reach of government authority. New courses were created, too. The weekly Law and Security Colloquium, offered since 2003 and led last year by David Golove and Stephen Holmes, gives some 30 students the opportunity to read journalistic and academic books in the field and then meet with the authors to debate their findings. Past guests have included Pulitzer Prize winners such as the *Washington Post*'s Barton Gellman (*Angler: The Cheney Vice Presidency*) and the *New Yorker*'s Lawrence Wright (*The Looming Tower: Al Qaeda and the Road to 9/11*). Other visitors have more formal expertise, such as former CIA operative Marc Sageman (*Leaderless Jihad: Terror Networks in the Twenty-First Century*). In December 2008, *New Yorker* staff writer Jane Mayer, who wrote the critically acclaimed *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals*, a 2008 National Book Award finalist, was one of the colloquium's guest speakers. In addition to ample praise from several students, her discussion about interrogation received some respectful dissent. Andrew Sagor '10, who before coming to NYU worked from 2003 to 2007 as a special assistant in the Office of War Crimes in the State Department, argued that indefinite preventive detention of some terrorism suspects can be justified on security grounds and doesn't necessarily lead to abuse. "No one wants to torture for the sake of torture," added Sagor.

Perhaps not, Mayer said, but her conversations with CIA operatives have revealed that some of them earnestly believe that indefinite detention, rough treatment, and, ultimately, the fear of death can elicit valid information. "I've interviewed people at the agency," Mayer explained, "who say that anyone who says torture doesn't work doesn't know what they're talking about."

[redacted] "It's really helpful to hear from a combination of investigative journalists and former government officials," he said. "There are a lot of pieces of the puzzle, and the colloquium helps you fit the pieces together." [redacted]

Andrew Sagor '10, on the Law and Security Colloquium

Afterward, Sagor, who hopes to combine private practice with future government service, called the colloquium a welcome contrast to more traditional black-letter law courses. "It's really helpful to hear from a combination of investigative journalists and former government officials," he said. "There are a lot of pieces of the puzzle, and the colloquium helps you fit the pieces together."

The newest addition to the curriculum, Counter-Terrorism and the National Security Constitution, taught by Samuel Rascoff since 2008, guides students toward a practical view of the topic that might confound the typical prosecutor, cop, or defense lawyer. During one class last fall, Rascoff urged his students to consider whether terrorism investigations should be shaped exclusively by the goal of achieving jury convictions, as opposed to squelching threats before they coalesce. With that choice in mind, prosecutors might refrain from taking marginal cases to court. Instead, they might concentrate on turning budding extremists into intelligence sources. The government has undermined its counterterrorism campaign by seeking to imprison people with radical views who have shown no proclivity for violence, rather than cultivate them as informants, Rascoff told the class. He cited the *Terrorism Trial Report Card*: "It's a pretty dismal or, at best, a lukewarm record on the part of the Justice Department."

THERE ARE TWO ASPIRATIONS BEHIND THE LAW AND SECURITY work of faculty and students: to help shape public policy and help individuals caught in the web of new and hastily drawn laws. Besides the Center on Law and Security, several other NYU Law centers make these goals possible: the Center for Human Rights and Global Justice, which oversees the International Human Rights Clinic, taught by faculty directors Smita Narula and Margaret Satterthwaite; the Brennan Center for Justice and its Liberty and National Security Project; and the Center for the Administration of Criminal Law.

In several papers published since 2004, all partly researched by students in the human rights clinics, the CHRGJ has criticized the U.S. government for secret detentions, renditions, and torture. A few months after releasing "Torture by Proxy: International and

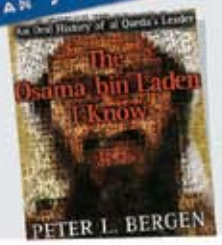
Continued on page 23

2005

"Protecting national secrets in terrorism trials presents a genuinely difficult problem. But...creating a special military system to deal with it...is dangerously short-sighted...."

Publication of *The Secrecy Problem in Terrorism Trials*, co-authored by Stephen Schulhofer.

JAN 3 2006

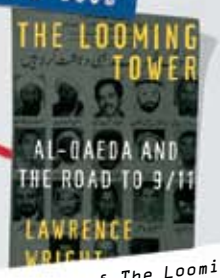


Publication of *The Osama bin Laden I Know: An Oral History of al Qaeda's Leader* by Peter Bergen.

JUN 4 2006

Spanish magistrate Baltasar Garzón, while participating in the CLS's Transatlantic Dialogue, calls for the closing of the U.S. prison at Guantánamo.

AUG 8 2006



Publication of *The Looming Tower: Al-Qaeda and the Road to 9/11* by Lawrence Wright.

A Plan to Make the World Safer

In 2000, Ronald Noble took a leave of absence from the NYU School of Law to assume the leadership of INTERPOL. As secretary general of an international police organization that serves 187 countries, Noble has stressed the need to give police more prominence in the global fight against terrorism. He laid out his vision in a speech, "Confronting the Terrorist and Transnational Crime Challenges of the 21st Century: Are We Prepared?" at the Law School's Hoffinger Criminal Justice Colloquium last January.

"We must move from a predominantly military-led approach to fighting terrorism to one that employs all components—diplomacy, military, intelligence, and policing—with equal vigor," said Noble, who served as undersecretary of enforcement for the U.S. Treasury from 1993 to 1996. In that job he oversaw the Secret Service, Customs Service, and the Bureau of Alcohol, Tobacco and Firearms. Taking issue with the phrase "war on terror," Noble argued that such terminology skews counterterrorism too far in the direction of military solutions "using soldiers, weapons, and combat strategies. Wars have clearly defined opponents and objectives, but this does not apply to al Qaeda, which is neither a state nor a nation, but instead a decentralized network of individuals."

A major weapon in INTERPOL's arsenal for tracking and neutralizing criminal networks is its collection of databases that allow the law enforcement community to connect tips and clues around the world. INTERPOL manages a library that recently included 94,000 sets of fingerprints, 88,600 DNA profiles from 50 countries, and information on 12,400 persons suspected of being linked to terrorist activities. It also maintains the only global stolen and lost travel documents database, whose 18.6 million documents shared by 145 countries are queried more than five million times per week. How the information is used is ultimately important. Despite numerous terrorist plots that have involved fraudulent passports, only 51 countries systematically screen travel documents at their ports; the U.S. joined that group only recently.

Noble made the case that law enforcement across the globe must occupy a larger role in counterterrorism. "One reckless murder or the destruction of property is a police matter," he said. "So, too, mass murder and mass destruction are police matters, not because of an abstract categorization but because we, the police, have the tools, the experience, the mindset, and the determination to investigate and solve these sorts of crimes and, at times, to prevent them from happening again."

Noble, who teaches criminal law to LL.M. students in the NYU@NUS Singapore Program, raised the question of whether, given the current global financial crisis, counterterrorism and combating other transnational crimes could remain a top priority for the U.S. and other nations. But, he argued, neglecting those issues also has a financial impact: "Unless our citizens and businesses are secure physically and feel secure psychologically, there can be no solid and sustained economic development or recovery. Just one major international terrorist attack against the U.S. or its allies could push us even deeper into a worldwide recession."

In the end, Noble concluded, everyone in the counterterrorism world has an important function: "Please don't think that the military only or diplomacy alone will solve the problem, and please don't think that the intelligence community can do it alone." Rather, he says, effective counterterrorism requires a concerted effort in which law enforcment has an essential role to play.—*A.G.*

Beyond the Academy

The Center on Law and Security funds some of the research of an impressive roster of journalists, scholars, and practitioners.

Peter Bergen
CREDENTIALS: Fellow, New America Foundation
RELEVANT WORKS: *The Osama bin Laden I Know: An Oral History of al Qaeda's Leader* (2006)

Sidney Blumenthal
CREDENTIALS: Former senior adviser to President Bill Clinton and Senator Hillary Clinton
RELEVANT WORKS: *How Bush Rules: Chronicles of a Radical Regime* (2006)

Barton Gellman
CREDENTIALS: Staff Writer, *Washington Post*
RELEVANT WORKS: *Angler: The Cheney Vice Presidency* (2008), expanded from a Pulitzer Prize–winning series in the *Washington Post*

Nir Rosen
CREDENTIALS: Journalist who has worked in occupied Iraq, Somalia, Congo, Syria, Jordan, Egypt, Turkey, Pakistan, and Lebanon
RELEVANT WORKS: *The Triumph of the Martyrs: A Reporter's Journey into Occupied Iraq* (2008); *In the Belly of the Green Bird: The Triumph of Martyrs in Iraq* (2006)

Michael Sheehan
CREDENTIALS: Former Deputy Commissioner of Counterterrorism, NYPD; former Assistant Secretary General, U.N. Department of Peacekeeping Operations
RELEVANT WORKS: *Crush the Cell: How to Defeat Terrorism Without Terrorizing Ourselves* (2008)

Lawrence Wright
CREDENTIALS: Staff writer, *New Yorker*
RELEVANT WORKS: *The Looming Tower: Al Qaeda and the Road to 9/11* (2006), winner of the 2006 Pulitzer Prize for nonfiction

In addition to the current fellows above, former fellows whose work has been supported in part by the Center on Law and Security include: **Tara McKelvey**, senior editor at the *American Prospect* and author of the anthology *One of the Guys: Female Torturers and Aggressors*; **Amos Elon**, historian and social critic who wrote *Israelis: Founders and Sons*, among several other books; **Baltasar Garzón**, magistrate for Spain's National Court, who has ordered the arrest of Augusto Pinochet and Osama bin Laden; and **Dana Priest**, two-time Pulitzer Prize–winning investigative reporter for the *Washington Post* who wrote *The Mission: Waging War and Keeping Peace with America's Military*.

The "Doyenne of Counterterrorism"

One part intellectual salon for counterterrorism issues and one part clearinghouse for hard-to-procure documents and analysis, the Center on Law and Security arose from the unique vision of its founder, Executive Director Karen Greenberg. By welcoming a broad range of views, the center has become a respected institution in policy, scholarly, law enforcement, and media circles. Shortly after her book *The Least Worst Place: Guantánamo's First 100 Days* was released in March, she sat down with CLS fellow and Pulitzer Prize–winning journalist Lawrence Wright to discuss her work.

The Center on Law and Security is the strangest academic institution I have ever seen. There's a mixture of academics and cops and spooks that you would never see in any other institutional setting. What kind of model did you have? I didn't have a model, but I had one goal: reality. If you start with practitioners, you're guaranteed that some realistic relationship between theory and practice will take place.

One thing that strikes me in attending the center's events is that there is such a range of political views. It's not easily categorized as being left or right. Is that deliberate? It's important to listen to people no matter what end of the spectrum they're on because they believe what they think, and they think they're serving a positive end by their ideas. I'm always wanting to bring a broad range of perspectives—provided they are willing to listen to each other—to the table.

And your reach is not just American but international. Our first fellows were from Spain and the Continent. We've kept the transatlantic and Middle Eastern dialogue as alive as possible.

Why is this center at NYU? Because it has a vibrant law school that already has a reputation for attending to public policy matters.

The center was created in the context of the Bush administration. Now that that administration is part of history and Obama has turned a new page, how is that going to affect the center's work? We had to pay so much attention to the policies of the Bush administration that it limited us in scope. Now we are branching out into larger issues of national and global security. So we've started a civilian military project, we're doing some work on food security, and we're increasing our focus on foreign policy and the way it relates to our law enforcement and military strategies. And of course, we'll continue documenting whatever needs to be documented for current journalists and future scholars.

Do you feel you're actually going to be able to affect the policies of this administration? Without a doubt.

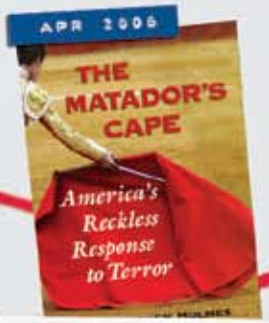
How? The center was created as a place to broaden the perspective of practitioners. Having an institute that can take the time and effort to think through discrete issues such as detention or privacy could prove to be invaluable.

Now, torture: How did you decide to champion this cause of shining light on practices of torture? I had stumbled upon a national policy that, once named and exposed, I thought would disappear—because it was beyond my imagination that there would be a government that would embrace this policy as laid out in the memos. And then it became a cause only because it so obviously was the wrong road to go down.

Was it your interest in exploring this issue that led you to Guantánamo? The detention issue has been central to the war on terror and our need to design a policy, whether we're having terrorism trials domestically, which the center has spent a great deal of time analyzing and collecting data on, or whether at Guantánamo, Bagram, or Abu Ghraib. And so it was the detention issue and the possibility of trials that led me to Guantánamo, not necessarily torture.

How does working in this dark area, on such dark issues, affect your outlook? People used to say when I first took this job, "How can you think about these things all the time? Don't you get really scared?" You could get scared thinking about some of the scenarios. But our feeling at the center is the more you know, the better informed you are, the safer you feel. And there are a lot of really good, smart people working on this, and the more they have a say and the more they're in government, the safer we are.

APR 2006



Publication of *The Matador's Cape: America's Reckless Response to Terror* by Stephen Holmes.

AUG 2007

"...rendition to justice, ...developed to uphold the rule of law against lawless terrorists, has become [extraordinary rendition], a lawless practice that perverts the rule of law in relation to terrorism."

Publication of "Rendered Meaningless: Extraordinary Rendition and the Rule of Law" by Margaret Satterthwaite in the *George Washington Law Review*.

4,000th U.S. soldier dies in the Iraq War.

MAR 23 2008

JUN 26 2008

Vice President Cheney's Chief of Staff David Addington and former White House lawyer John Yoo testify before the House Judiciary Committee about the use of torture in interrogation of suspected terrorists.

MAR 23, 2008: FLICKR COMMONS/US ARMY; JUN 26, 2008: AP PHOTO/SUSAN WALSH

MARGARET SATTERTHWAITE

Extraordinary Rendition

With the inauguration of Barack Obama, Associate Professor of Clinical Law Margaret Satterthwaite held hope that her influential scholarship and activism against extraordinary rendition would cease to be necessary. Since 9/11, she has written articles such as "Rendered Meaningless: Extraordinary Rendition and the Rule of Law" (2007) and a 2004 white paper, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" that spell out the responsibility of the U.S. government to end the practice of transferring terrorism suspects to third countries known to use torture, as well as to investigate, prosecute, and punish those who utilize it.

But Satterthwaite's work continues. Just as the notorious Guantánamo Bay detention center remains open while the administration studies what to do with its more dangerous prisoners, the CIA retains the authority to conduct "ordinary" rendition, meaning that the U.S. may continue to snatch terrorism suspects around the globe and send them to third countries provided that it obtains assurances from the receiving countries that detainees won't be tortured.

Satterthwaite, faculty director of the Center for Human Rights and Global Justice, is now analyzing what legal standards ought to apply to Obama's "rendition lite." She hopes her conclusions—which will appear in a forthcoming law review article—will help shape the report of an interagency task force Obama has charged with addressing the issue. "The work is intellectually harder, because the answers are less obvious" now that policies are less extreme, Satterthwaite says.

In Satterthwaite's clinical human rights work, which allows NYU students to participate in cutting-edge litigation, she represents Mohamed Farag Ahmad Bashmilah, a Yemeni who was rendered and held in CIA "black sites" for more than 18 months before being released in his native country without having ever been formally charged with terrorism. In 2007, Bashmilah sued Jeppesen Dataplan in federal court, accusing the Boeing subsidiary of providing flight services for his allegedly illegal detention and questioning.

The Bush administration intervened in the ACLU-led case, arguing that the litigation should be dismissed because open court proceedings risked revealing sensitive state secrets. The trial court agreed with the government, and surprisingly, a Justice Department lawyer told the appellate court in February 2009 that the Obama administration would continue to argue the so-called state secrets doctrine and seek to stop the lawsuit.

Satterthwaite said, "It was literally just Bush redux—exactly the same legal arguments we saw the Bush administration present to the court." She adds: "Our role in the case clearly isn't over." *—P.B.*

STEPHEN SCHULHOFER

Law Enforcement

After 9/11, Stephen Schulhofer, Robert B. McKay Professor of Law, wondered how rules for international electronic surveillance differed from those governing domestic investigations and how the military commissions set up to try detainees at Guantanamo would contrast with conventional courts. A traditional scholar of U.S. criminal law ("My work had been about U.S. law, within domestic boundaries," he says), Schulhofer followed his curiosity in a new direction that included military and international law. Beginning with a detailed exegesis of the Patriot Act that heavily informed his 2002 book *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11*, he inched his way into the field of Law and Security.

Schulhofer's examination of the Uniform Code of Military Justice, the Geneva Conventions, and related protocols spurred him to rethink the strengths and weaknesses of the U.S. court system in trying accused terrorists. He concluded that the same Article Three courts that hear cases involving alleged gangsters and securities-fraud artists have proven themselves quite capable of handling international conspiracies. Although classified intelligence complicates the matter, he says, "if the courts can deal with taking down the mob, they can deal with terrorism." In *Guantánamo and Beyond: What to Do about Detentions, Trials, and the 'Global War' Paradigm*, published earlier this year, Schulhofer offers the Obama administration a road map for reasserting the primacy of conventional courts and military courts martial over special military commissions. "Sometimes, despite the complexity of a problem, the simplest solution is best," he contends. By employing existing laws such as the Classified Information Procedures Act, federal judges can allow the government to protect secrets even while allowing for an accountable and largely public trial process. To support this view, Schulhofer interviewed dozens of prosecutors, defenders, and judges from the major international terrorism trials in New York in the 1990s. These trials resulted in long prison terms for nearly all of the defendants and no significant exposure of classified intelligence.

Schulhofer and University Professor Tom Tyler are now collaborating on a large empirical study of the impact of counterterrorism investigations on Muslim communities in Brooklyn and East London. Funded by the National Science Foundation, the research involves hundreds of interviews to determine how surveillance, enforcement, and community-relations policies shape Muslim attitudes toward cooperating with authorities in identifying dangerous individuals. "We want to see which mixture of policies encourages compliance with the law and assistance to the police," says Schulhofer. The answer could point toward a wiser balance of security and civil liberties. *—P.B.*

Domestic Law Applicable to Extraordinary Renditions," jointly published by the CHRGJ and the Association of the Bar of the City of New York, Satterthwaite, the report's co-author, stood behind Massachusetts Congressman Edward Markey as he introduced the Torture Outsourcing Prevention Act in February 2005. In a 2006 report, "Irreversible Consequences," principal co-authors Narula, CHRGJ Research Director Jayne Huckerby, and International Human Rights Clinic students Adrian Friedman (LL.M. '06) and Vrinda Grover (LL.M. '06) criticize authorities for mishandling race and religion in the war on terrorism. They argue that so-called "shoot to kill" protocols adopted by the world's police agencies to eliminate suspected terror bombers rely too heavily on stereotypes and lead to avoidable tragic mistakes, such as the London shooting of Jean Charles de Menezes, a Brazilian electrician. According to the report, "profiling sends the problematic message that the security of some is worth more than the security of others; or worse, that human rights abuses against those who fit into this ill-defined category of 'terrorist' are a necessary precondition to ensuring the security of the nation."

> [redacted] "Terrorism, unfortunately, is one of the challenges of our times, and the Law School has to be involved in figuring out how we best respond while preserving the rule of law." [redacted]
>
> Stephen Holmes, Walter E. Meyer Professor of Law

Just last year, CHRGJ Fellow Lama Fakih '08 worked with Martin Scheinin, U.N. special rapporteur on counterterrorism and human rights, to develop policy initiatives regarding gender in counterterrorism efforts. When the U.S. military detains Muslim men, typically their family's breadwinners, the impact on women and children can be devastating, said the Beirut-born Fakih, who studied Islamic law in Egypt as a Fulbright scholar. When military interrogators force Muslim men to don women's clothing, she added, the long-lasting effect is cultural humiliation.

The ambiguity surrounding enemy combatants and detainees has created plenty of opportunity for litigation, too. The Brennan Center for Justice was part of the legal team that represented Ali Saleh Kahlah al-Marri, a legal U.S. resident detained as an "enemy combatant" without charge in a South Carolina navy brig for nearly six years. In December the U.S. Supreme Court granted certiorari review, but in March before oral arguments were made al-Marri was indicted and transferred into the civilian criminal justice system. The Supreme Court dismissed his habeas case as moot and vacated a lower federal court decision giving the president power to detain citizens and legal residents indefinitely. "We are disappointed that the court did not firmly clarify the limits of the executive's detention power," said Brennan Center Counsel Emily Berman '05. "But we are happy that Mr. al-Marri finally got his day in court." The center has also filed amicus briefs on behalf of a Canadian seeking damages after being extraordinarily rendered by the U.S. government to Syria, where he was tortured, and a group of 17 Chinese Muslims held at Guantánamo Bay since 2003 who are seeking habeas relief.

In September 2008, Anthony Barkow, executive director of the year-old Center for the Administration of Criminal Law, visited Guantánamo and attended military tribunal proceedings as a volunteer observer for Human Rights First. Noting allegations of improper political influence on prosecutors, restrictions on public access to the proceedings, and problems with Arabic-English interpretation, Barkow advocates a fact-based analysis of each detainee case "with the hope that as many as possible should be tried in the federal courts."

Barkow's center has filed numerous amicus briefs on behalf of criminal defendants treated unfairly by overly aggressive prosecutors, says Barkow. In May, the Supreme Court unanimously agreed with the center's position supporting the petitioner in *Abuelhawa v. United States*, which concerned a man who used his cell phone to buy a small amount of cocaine from another man whose telephone was monitored by the FBI. Both men have Muslim surnames. The buyer argued he had been wrongly convicted of a high-level felony given the fact that the law considers possession of drugs solely for personal use a minor offense often addressed by court-ordered treatment and rehabilitation.

Each day's headlines bring intricacy and change to the complicated and fast-moving field of Law and Security. But with its broad mix of faculty, administrators, and students taking part in the debate, the NYU School of Law remains a relevant source of, and place to exchange, ideas. "We're looking for a balance of scholarly deliberation and real-time analysis," says Holmes. "Terrorism, unfortunately, is one of the challenges of our times, and the Law School has to be involved in figuring out how we best respond while preserving the rule of law." □

Paul Barrett is a journalist, an adjunct professor at the NYU School of Law, and the author of American Islam: The Struggle for the Soul of a Religion (2007). *Additional reporting by Thomas Adcock.*

NOV 26-29, 2008/AP PHOTO/MUMBAI MIRROR, SEBASTIAN D'SOUZA

MAYRA PETERS-QUINTERO '99, Program Officer, Migrant and Immigrant Rights, Human Rights Unit, Ford Foundation: Immigration enforcement issues have received unprecedented public attention recently. We've seen coverage in the mainstream media on whether local officials should enforce immigration law, workplace raids, detention conditions, and representation for immigrants. The new administration faces the task of providing day-to-day guidance to government officials who administer the immigration laws and are the center of our enforcement scheme. This roundtable will be an opportunity to reflect on these issues from the different perspectives around the table. A good place to start would be to ask each of you: **If you could change one thing about the current enforcement system, what would it be?** Out of ingrained deference to judicial authority, I'll start with Judge Katzmann.

FOR MORE THAN A DECADE, THE U.S. HAS ASSUMED A TOUGH STANCE MUSCLES ON DEPORTATION, AND RAIDING WORK SITES. TEN ALUMNI AND IMMIGRATION—DISCUSS THE ENFORCEMENT OF IMMIGRATION LAW AND

THE HARD LINE ON

ROBERT KATZMANN, Judge, U.S. Court of Appeals for the Second Circuit; Adjunct Professor, NYU School of Law: I would try to facilitate effective legal representation in the system. A system in which nationally only 35 to 42 percent of immigrants have legal representation is flawed. Given the high stakes for immigrants and their families, the lack of representation and the problem of deficient representation pose real challenges in terms of assuring fairness.

GREGORY CHEN '97, Director for Legislative Affairs, Lutheran Immigration and Refugee Services: Lutheran Immigration and Refugee Services has a broad base of networks, people, and organizations providing services for immigrants. Its greatest concern is about the escalation of detention and the resulting inhumane treatment of detainees.

Recently, a Department of Homeland Security official testified that in fiscal year '09, they anticipate 442,000 people will be held in the immigration detention system. That's an astronomical increase in the past 10, 15 years. The budget allocation is over $1.5 billion for detention. There is this disproportionality. Why are we using prisonlike facilities for people who pose no threat to physical safety, no threat to national security, and also are likely to appear at immigration proceedings because they've got a family and a job?

What strikes home the most is the fact that the Lutheran church is a midwestern, moderate constituency, and they have come out and said: "We're shocked about this. We're concerned about what we hear. Aren't there alternatives?" Rule of law is very important to the Lutheran constituency. What about using parole, alternatives to detention and incarceration, that the criminal justice field has already massaged? For some reason, the immigration system just hasn't been able to mine those creative solutions for more humane and also less costly alternatives.

CRISTINA RODRÍGUEZ, Professor of Law, NYU School of Law: In my "official capacity" as someone who is originally from south Texas, I would reorient our approach to the border and border enforcement. Resource allocation is dramatically weighted in favor of border enforcement, rather than enforcement in the interior. But much of what is spent on the border represents a gigantic waste of money, because there's very little return. I don't mean there's little return with respect to either deterring undocumented immigration or in the number of arrests, but in terms of security, which is the way that border enforcement is generally sold.

The construction of the fence, in particular, is highly disruptive to communities that are real binational communities, and that's a substantial loss. From a foreign affairs perspective, it's exactly the wrong way to set the agenda with Mexico, which should be a partner in trying to deal with broader immigration-related issues, such as how to manage migration between the two countries and reduce undocumented immigration.

RACHEL ROSENBLOOM '02, Assistant Professor, Northeastern University School of Law: I would agree with that point, and add that there's a significant waste of money in interior enforcement that we should be worried about as well. I don't think we should see the border and the interior as pitted against one another, but rather as part of the same, larger picture.

All of which raises the question of prosecutorial discretion. Not everyone who is deportable should be deported. Before thousands of dollars are spent on detaining and deporting someone, we need to ask: Is there a substantial federal interest in the removal? In the final days of the Clinton administration, INS Commissioner Doris Meissner issued a memo on prosecutorial discretion that laid out a set of criteria for answering this question: What are the person's ties to the U.S.? Are there family members depending on this person? If there is a criminal conviction, how serious was the offense and how long ago did it occur? This memo is unfortunately a dead letter these days. If the established criteria were being used, far fewer people would be in removal

proceedings, which means fewer people detained, fewer people in need of counsel, and fewer petitions for review taking up space on Judge Katzmann's docket.

ANDREA G. BLACK '96, Network Coordinator, Detention Watch Network: I've been thinking about this question of "if there were one thing…" What really can get at the core of creating change?

In my mind that one thing would be a cultural shift away from the criminalization of immigrants overall, looking at balanced enforcement that upholds due process and human rights and at strategic priorities that keep our country safe. We're seeing the creation of an underlying link between the immigration enforcement system and the criminal justice system. Immigrants are now the fastest growing population in our prison system. The U.S. is increasingly using our failed criminal justice system to imprison, detain, and deport immigrants. So unless we target that underlying culture, it's going to be hard to have more than superficial changes.

PHILIP J. COSTA '92, Deputy Chief Counsel, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security:* I would like to pick up on the issue of prosecutorial discretion. I get frustrated when I hear attorneys say that ICE does not exercise prosecutorial discretion, because I know firsthand that it does so every day.

I am responsible for new attorney training in my local office, and every single attorney who joins our office receives a lengthy lecture from me about prosecutorial discretion on his or her very first day. I explain that prosecutorial discretion is a key litigation priority. I make clear that I expect ICE attorneys to be the most prepared attorneys in the courtroom, that I expect them to understand the extraordinary stakes that are at issue for each applicant, and that I expect them to understand that their job is not to win a case but rather to achieve the correct result.

I also chair a working group that recently established ICE's first national trial advocacy training program. And at the close of each program, after spending a week teaching trial techniques to ICE attorneys, I personally lead a discussion on prosecutorial discretion. So ICE attorneys get the message very clearly that prosecutorial discretion is a key litigation priority and that they must exercise their authority responsibly.

BENITA JAIN '03, Co-Director, Immigrant Defense Project: Andrea's comment about a cultural shift is incredibly important. The culture or the goal at both DHS and DOJ is often "Let's try to deport as many people as we can." Numbers are the measure of success—more people detained, more people deported—and not necessarily proportionality or fairness or some other value.

I would love to see in both agencies a more reasonable approach to interpreting immigration statutes. We have a regime that subjects immigrants to some of the harshest consequences imaginable, including mandatory deportation and mandatory detention. On top of that, we have DHS looking for aggressive outlier arguments to expand the intended reach of these laws. For example, they have argued that simple drug possession is really drug trafficking, which would result in mandatory deportation. And that a drunk driving offense is a crime of violence. And that a misdemeanor offense is an aggravated felony. Taking the law to the extreme, whether the language calls for it, whether Congress actually intended these consequences, is a big problem. Even Judge Posner once said that the only thing consistent about the government's approach is that the immigrant always loses.

OMAR JADWAT '01, Staff Attorney, ACLU Immigrants' Rights Project: If you're not going to change any statutes, discretion is the key to getting the system that we have working better. But not necessarily just prosecutorial discretion in the classic sense of a prosecutor operating on a set of facts that's before him and deciding, Is this a case that, according to some guidelines, makes sense to defer or not?

The federal executive is, or should be, in charge of this whole system, at least until a case goes up on appeal. So if, for example, immigration judges are totally overloaded, that's in part because the federal government isn't exercising its discretion overall in a way that makes that system work, that makes it possible to allocate those resources the right way. You've got people at various points in the system shoving cases into the funnel without regard to whether the funnel's backed up or, realistically, how many cases is it reasonable for us to put in, given the capacity we have? What's a reasonable way to interpret the laws, given the facts on the ground?

KATZMANN: Isn't the statistic something like 1,500 cases per immigration judge? Also, in terms of how much support that judge gets, there's one law clerk for six immigration judges. It takes time to reach the right decision. Especially in these cases, which are so difficult and are so fact-intensive, if you don't have the time and

*MR. COSTA PARTICIPATED AS AN ALUMNUS AND NOT IN HIS OFFICIAL CAPACITY WITH THE DEPARTMENT OF HOMELAND SECURITY.

ON NONCITIZENS BY INCREASING ITS USE OF DETENTION, FLEXING ITS FACULTY—LAWYERS AND JUDGES WHO HAVE FIRSTHAND EXPERIENCE WITH THE COSTS AND IMPACT ON OUR NATIONAL SECURITY AND OUR SOCIETY.

IMMIGRATION

AN NYU LAW ROUNDTABLE DISCUSSION

resources to develop the record and to think through the issues, it's very hard to secure justice.

NANCY MORAWETZ '81, Professor of Clinical Law, NYU School of Law: Part of the problem is that it's not prosecutors who are making the decision to issue an NTA. A Notice to Appear, which starts the whole deportation process, is issued by a border patrol officer, an immigration customs enforcement officer, or from somebody having been identified just because they were arrested, even if the charges were dismissed. So cases are placed in the system by people who aren't really held institutionally responsible for whether those are the right cases to be in the system, whether those cases cause enormous cost to the system and to those individuals. If somebody is arrested in a city jail, is identified and placed in proceedings, that person might raise a defense that he or she is a citizen. During the months or years it takes to prove citizenship, he or she could be detained or shipped around the country.

What I would try to do is go back to a document called Operation Endgame, which was announced in 2003. It was a blueprint to literally "remove all removable aliens." And it launched a whole series of projects that led to an internal culture at the agency of "If you can find someone, and they're removable, then put them in." Maybe if they can come up with a defense, they can persuade the immigration prosecutor that they have a good case. It's quite true that when people can show relief, in many cases the immigration customs enforcement lawyers will waive appeal. But generally, they feel limited to where it's clear the person has relief. So the problem is up-front. Cristina raised the question, is this a border-enforcement-versus-interior-enforcement question? What I would really hope is that we get beyond that zero-sum game concept in which there has to be a shift and the agency has to show large numbers—because if you ask for numbers, you'll get numbers.

I would look for the Department of Homeland Security to officially repudiate Operation Endgame. To say, that's the enforcement practices of the last administration. And that they are looking to design enforcement at the border and away from the border that is thoughtful about whether it makes sense at the very beginning to place somebody in proceedings. If somebody is going to be able to adjust their status, but their number just hasn't come up yet, why are you putting that person in proceedings? The person who makes that decision at the beginning can't just have an institutional job that says, you find the people, and somebody later will figure out what we do with the people. They have to have some responsibility at the beginning to be asking whether they're finding the right people in the first place.

ROSENBLOOM: I recently read a statistic that an estimated five percent of the population of the United States is removable. If that is anywhere close to accurate, that's a lot of people. I don't think any of us would argue that the job of this agency is to remove five percent of the population.

President Obama has signaled that this administration is shifting away from the large workplace raids we saw during the Bush administration. That's an important start. The question is, can the culture of the agency change enough to extend that approach to some tougher issues? For example, to say that ICE is no longer going to sweep up permanent residents who end up in county jails for minor offenses.

RODRÍGUEZ: Is there something inherent in the culture of an enforcement agency, where numbers are important as benchmarks, that leads in that direction? There's a need for external mechanisms of supervision, like congressional oversight. We should consider whether congressional oversight can be effective at shifting enforcement priorities, or if it's even possible for something to come from the top and change the culture of the whole agency. Or, do the agencies just develop enforcement priorities of their own without regard to direction they might or might not be getting from the political process? The resetting of priorities thus goes back to whether you can change the culture of the agency.

I'm curious what those who deal with the agency on a more regular basis think about the possibilities for that.

MORAWETZ: What happened with people with outstanding orders of removal is a good example of the problem of turning to numbers. People then got tagged and called fugitives, which is not fair, since many people with outstanding orders don't know that they have an outstanding order. Nonetheless, that was the stated priority. When performance standards were created geared to numbers, that priority shifted to being basically whoever could be rounded up. We represent such a person in our clinic who was simply living in an apartment that was the subject of a raid.

It's a lesson, because if you're looking for numbers, you're going to be making a lot of mistakes. There have been reported instances of citizens being placed in removal proceedings and sitting in detention for a long time. I don't walk around with my passport. We are not a country that requires a national ID.

JAIN: That is really instructive. Since 1997, more than one million people who have convictions or some kind of interaction with law enforcement have been deported. They've left behind more than two million spouses and children in the U.S. The stated reasons are national security and public safety, but people's experiences


BLACK


CHEN


COSTA


JADWAT


JAIN

don't bear that out. We see people being tagged for deportation—through jails, when they apply for naturalization, when they return from trips abroad—for convictions that may have happened years ago, and for which they've already served their time. People who have really gotten their lives together or are trying to get their lives back together are suddenly and permanently ripped from their families and communities. That's where prosecutorial discretion, and the need to determine whether a situation actually merits enforcement action, again comes in. Deporting one million people with convictions does not necessarily mean that our communities are safer when families have been split apart and these same communities are disintegrating.

BLACK: I was reflecting on what Cristina was saying, about this issue of what we need outside the system. Outside accountability is really critical, and we've been calling for not only codification of the detention standards that are currently in place but an outside oversight mechanism. Take the case of Sheriff Joe Arpaio in Arizona, who most recently paraded a group of shackled immigrants down the road, to the horror of a lot of people. Actually his local immigration enforcement program is under the supervision of ICE. In October of last year, ICE reviewed the program and said that they had no problems with it. Clearly there's some internal guidance that's missing. We need to think very carefully about what this outside oversight should look like.

Maybe it's a good time to talk about money interests too, because of our economy. It's not only the wastefulness. We know that there are many private-prison lobbyists on the Hill advocating for increased spending. But also, where is the money going in terms of local and state agreements? These local law enforcement agreements are meant to be unfunded mandates, so a lot of communities are actually suffering. However, the way these programs are being sold, local communities are being told that there's going to be money for their detention beds. For example, at another recent hearing in Washington, a local sheriff in Maryland said that it costs him $7 a day to house and feed an immigration detainee, and he gets $83 a day from the government. And then he said, "Oh, but there's no incentive for me." Seriously.

JAIN: And the amount of money that's spent in appealing immigration judges' grants of relief, in keeping people in detention, or in litigating through the federal courts is phenomenal.

CHEN: It is striking to see how faith leaders are responding to the immigration debate. A lot of faith communities see rule of law as being very important. But they are also seeing that punitive enforcement of those laws is inhumane and morally wrong. The extreme cases of enforcement have galvanized a shift in attitudes and beliefs about the fairness and justness of our laws and government practices. It's beginning to happen where people see the inhumanity of enforcement actions. Last year, there was the largest raid ever, at a Postville, Iowa, facility. The Lutheran bishop from northeastern Iowa was born and raised in Postville. He spoke with personal conviction about what had happened to his community of a few thousand. To have 400 people suddenly gone has reverberations across the community. Schools actually had to close down; teachers lost their jobs.

Lutherans and everyday Americans were shocked by the fact that they used black Suburbans and helicopters and all sorts of high-tech weaponry when it was highly unlikely that anyone was armed in the factory. Many of the workers were unlikely to present a flight risk. Then the government charged them with aggravated felony identify theft and used aggressive bargaining tactics, such as exploding plea offers. Those detained had counsel that were representing huge numbers of clients and had little time to prepare their cases. There's been a culture of fear, especially post-9/11, that has enabled people to ferret out and identify anybody who might be different. Until a shift in attitudes occurs, where that pervasive fear dies down, it's going to be very hard in local communities to have rational and fair policies and legal reform.


KATZMANN


MORAWETZ


PETERS-QUINTERO


RODRÍGUEZ


ROSENBLOOM

JADWAT: Part of what we need may be a culture shift, but part of it is also just a volume shift—getting politicians to understand, which maybe they saw to some degree in the last elections, that what they're getting in their in-boxes and on their phone lines from these very well-organized restrictionists is not really representative of what people at large are thinking.

COSTA: I lend a different perspective because I'm hearing the agency that I'm a part of described. The culture that many of you are describing has nothing to do with the agency that I work for. At the heart of ICE's mission is the protection of our communities by targeting national-security risks, dangerous criminal aliens, and aliens who have committed human rights atrocities, including persecution, torture, and extrajudicial killing.

Frankly, I'm taken aback at the notion that the jails are a bad place to look for litigation priorities. It strikes me that jails are actually a particularly good place to look. I appreciate that there are difficult cases, and we may agree to disagree about what constitutes a "minor" crime. For example, in my judgment, someone who has engaged in DWI, which statistics reveal is often a recidivist offense, presents a real threat to the community.

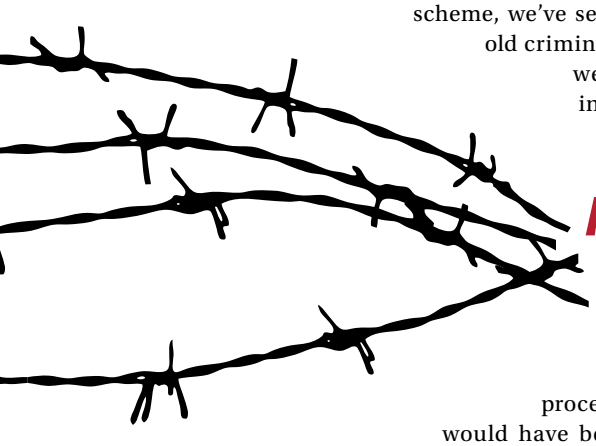
Further, I object to the notion that there is not a substantial security payoff for ICE's enforcement actions. The government

doesn't get extra points for removing somebody on a national security-related charge if a simple visa-overstay charge works just as well. Sometimes, what seems like an ordinary immigration charge involves additional considerations.

ROSENBLOOM: No one would question the notion that preventing terrorism is a worthy goal. The problem lies in leaping from that to justify a broad range of enforcement actions that have nothing to do with terrorism. Deporting a former drug-user who has children depending on her is not going to make America a safer place for anyone, and it is going to destroy a family in the process. So-called "criminal aliens" are often simply ex-offenders who are important and valued members of their family and community.

JAIN: Of people who have been deported because of convictions, at least 65 percent have been for nonviolent offenses. Perhaps 20 percent for violent offenses. They have included veterans that have fought on behalf of the United States. Identifying an immigrant who has a conviction does not automatically mean that you're protecting a community and enhancing public safety.

COSTA: We've talked a little bit about older crimes. For those of us who have lived through changes in the statutory scheme, we've seen people with old criminal offenses who were never put into immigration proceedings but who would have been eligible for relief if they had been put into proceedings. Then suddenly the immigration laws change. Now some of these same people travel abroad to visit family, and when they show up at the airport upon their return, they have a problem. This resulted in a hailstorm of litigation, going all the way up to the Supreme Court.



A LOCAL SHERIFF IN MARYLAND SAID THAT FEED AN IMMIGRATION DETAINEE, AND HE

JAIN: Nothing requires DHS to take the extreme positions on statutory interpretation that it does. In case after case, the Supreme Court keeps overturning the government, sometimes unanimously. The *Lopez* opinion refuting the government's position that simple drug possessions are drug trafficking aggravated felonies, simply because a state labels them "felony," reads like a grammar lesson to the government.

You also mention that the law keeps changing. People who never imagined that they would have been deportable at the time they pled guilty years ago all of a sudden are. That and the lack of counsel for most people makes it even more important for the government to interpret laws more reasonably and use prosecutorial discretion.

MORAWETZ: How people get into the system is probably the most important question, and that's long before that case shows up in immigration court. But it's interesting to think about what happens in immigration court and what can be done to make that work better.

Are there things from your perspective, Mr. Costa, that could be done by people who care about the rights of immigrants to enhance the ability to exercise discretion?

My perspective is that certain kinds of discretion are easy. If you are in the middle of a hearing and it's clear the person has a really strong case, the government lawyers will often then say, that's enough, judge. We're willing to take an order. We're not going to appeal. That's a major form of discretion that goes on all the time. But the other forms, like, to drop the case, decide that the notice to appear was improvidently issued—my impression is that that's really hard, institutionally, for a lawyer to do, and that's a lot of work compared to going forward with the case. Are there things that could be done inside to make it more friendly to the exercises of discretion for the people who probably face a more crushing caseload than the immigration judges face?

COSTA: Sometimes applicants or their attorneys will ask ICE for the exercise of prosecutorial discretion. The applicant may have no statutorily available relief. Nonetheless, there may be compelling humanitarian considerations, and the applicant may ask ICE to consider administratively closing or even terminating removal proceedings. Depending upon the circumstances, ICE may be authorized to do that, but it needs a whole host of information to be able to make an informed determination. As a result, applicants and their attorneys need to provide ICE counsel's office with as much information as possible. I promise you, when someone brings that sort of request to ICE counsel's office in New York, every single request gets a close look.

I want to emphasize that we understand the significance of these cases to the applicants. In a typical asylum case, for example, the person sitting across from us is litigating issues relating to his immediate liberty and potential return to a country where he may face economic deprivation, persecution, or even torture. The stakes of these cases are extraordinary, even in the nondetained setting, particularly when you consider family reunification principles. Whether a claim is meritorious or nonmeritorious, a typical applicant walks into court thinking, "Depending upon what happens today, I may be able to see my wife or my husband or my children for the first time in five or six years." I cannot imagine something that could be more important.

PETERS-QUINTERO: Judge Katzmann, how do we increase adequate and competent representation in the system?

KATZMANN: Short of legislative solutions, one approach is to engage the legal community. These are not easy cases. It's not simply that a lawyer can go in without any training and do a competent job. What we have to do is to provide encouragement to lawyers in the private bar to work with lawyers in the immigration bar. It starts in law school. The immigration clinics can play a very critical role in interesting lawyers, even if those lawyers don't go into immigration practice itself. And law firms need to devote more of their pro bono resources to immigration.

The state gives lawyers a monopoly—the legal system is essentially a monopoly of lawyers—and in light of that monopoly, there surely is some reciprocal responsibility among the lawyers to serve those in need. The immigrant poor should be at the very top of the list. If you have more and more lawyers taking on these cases, they will have a greater understanding more generally of the complicated issues associated with immigration. Their involvement will enrich the public policy debate.

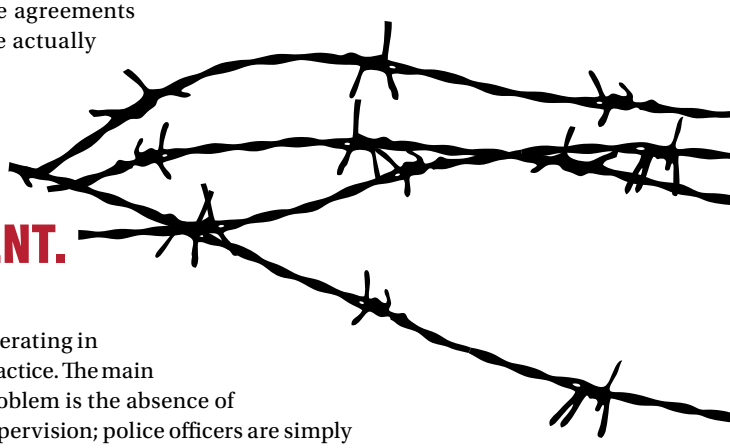
CHEN: Prior to coming to Lutheran Immigration and Refugee Services, I was director of policy at a refugee advocacy organization, but I also happened to run what, at the time, was the largest pro bono law program for children in immigration proceedings.

Pro bono lawyers can be excellent, but as the solution to the huge caseload that you're seeing in your courts and on your dockets, it's not the answer. Pro bono lawyers generally are highly selective in the kinds of cases they are willing to take and also can't take more than a few cases at a given time. Then also, for reasons of geography, for reasons of timing, there's going to be a large population of immigrants in proceedings, especially those detained, that can't be represented. At a fundamental level, there is not going to be any real basic way of replacing having a full-time practicing lawyer. So the answer has to involve some kind of paid-for counsel, maybe government paid-for counsel.

BLACK: For example, what about the people where I used to work in Eloy, Arizona, out in the middle of the desert? Currently there are two thousand people detained. Right now, there are two staff attorneys trying to perform legal orientation and consultation. It's definitely not representation.

It's so hard to get access to counsel when people are detained thousands of miles away from their families, and shipped around constantly. We have this system that actually moves people away from any access to counsel they may have. Then there are the conditions on top of that where the phones do not work consistently, there are no legal materials in the library. This goes to detention conditions. It's all really interlinked. Can we look at a system where alternatives to detention are really the norm, where there is access to counsel and access to pro bono services, and where if detention is used at all, it's used in those rare cases where it's needed for public safety? It's hard to look at one piece of the system without seeing the impact of the overarching detention and deportation system.

IT COSTS HIM $7 A DAY TO HOUSE AND GETS $83 A DAY FROM THE GOVERNMENT.



PETERS-QUINTERO: The issue of local enforcement has been in the news recently. Omar, you've worked on this issue. What is the problem, if you see one? Is there room for state and local bodies to enforce immigration law?

JADWAT: This comes up in several ways: 287(g) is the statutory program that allows state and local police to enter into agreements with the federal government to do certain aspects of immigration enforcement. There's also a whole bunch of other initiatives that seek to involve local law enforcement without a 287(g) agreement. Like, linking up the jail computer systems with ICE's computer system.

One obvious problem with having state and local police involved in enforcement is in terms of trying to get the federal government to intelligently prioritize and exercise discretion. That is made infinitely more difficult when it's not the federal government doing the initial thing that gets people into this process. They're cramming more people into the funnel with either no federal oversight because it's part of some informal program, or, in the 287(g) program, no use of the potential oversight that might be built into those agreements.

Another problem is that if you tell police that part of their job is to arrest illegal aliens, then, with the minimal training that a 287(g) officer would get, or, as is often the case when you have some sort of immigration enforcement without that training, often the way that gets implemented is that people of color and particularly Latinos get stopped and run through the system. So you have all of the negative effects of profiling and of estranging the police from the community.

RODRÍGUEZ: It is about setting priorities in two ways. One is the extent to which using police in the enforcement of immigration law can complement the setting of federal priorities, or whether it's actually creating incoherence.

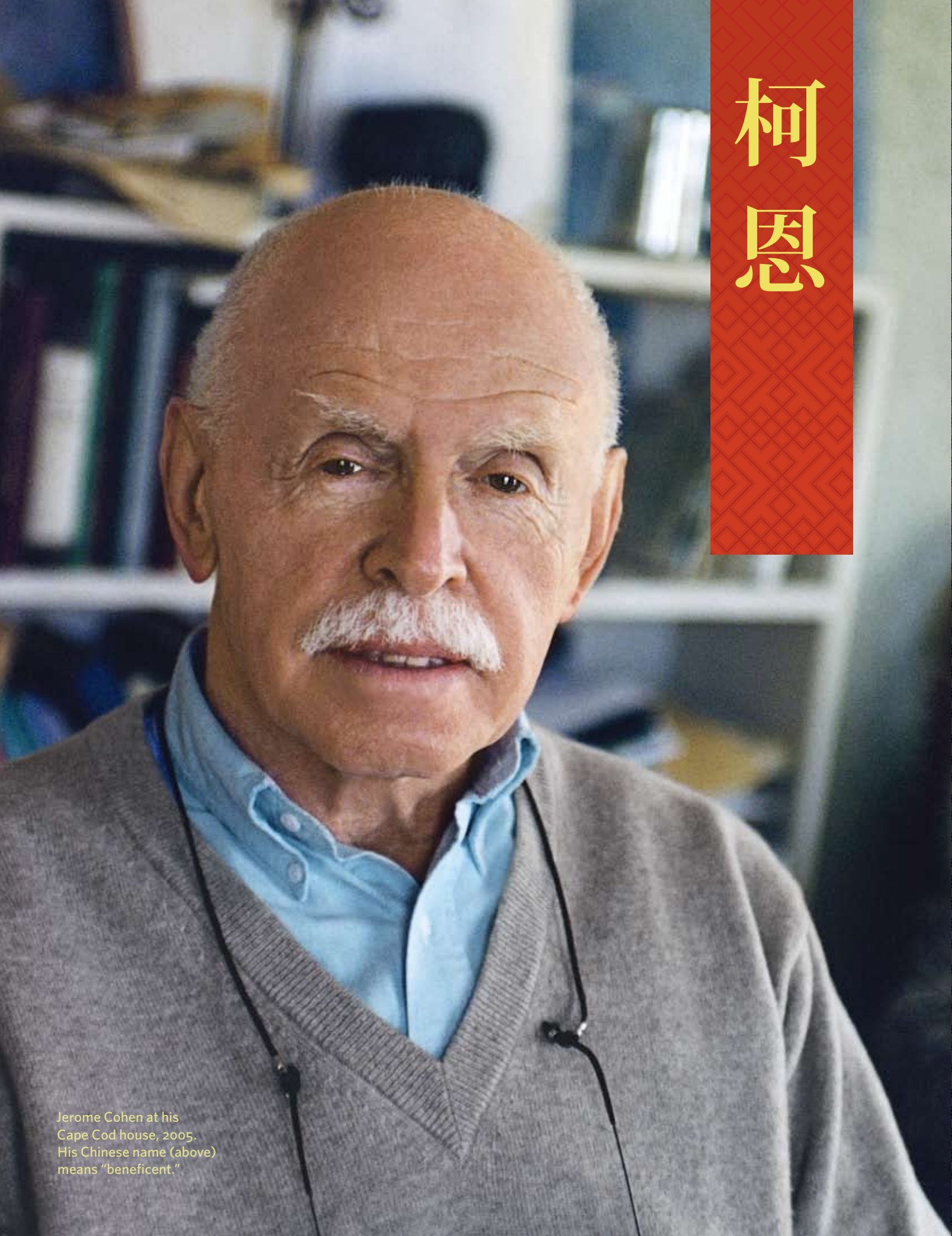
In the second sense, it's about priorities with respect to policing communities and advancing the public safety mission of law enforcement. If these agreements do undermine the ability of police to establish trust in places where they need trust, then they're a problem. The potential erosion of trust is why a lot of police chiefs are opposed to them.

Because it's a relatively new phenomenon, we have only strong intuitions about why it frustrates both sets of priorities, and the fear of racial profiling is obviously one. There's a growing body of anecdotal evidence suggesting that that's exactly how 287(g) authority is used. A study by the General Accounting Office just came out that is the most comprehensive look at how the agreements are actually operating in practice. The main problem is the absence of supervision; police officers are simply being told to arrest illegal immigrants and are then engaging in unfettered decision-making about who that means they should arrest.

So it goes back to what we were talking about before in finding mechanisms of oversight and accountability to make it work. Only if you can do that does it make sense as a model.

ROSENBLOOM: Just a final thought to tie together two themes that have emerged. People need counsel, and maybe they even need appointed counsel. That would be expensive. At the same time, the agency is spending millions of dollars each year to detain and deport people who are not a threat to the United States in any way. So let's save some money by scaling back these enforcement actions, and shift the dollars over to appointed counsel. That would take care of both problems together.

PETERS-QUINTERO: That's a great note to end on. I would just add, as someone who is not working directly on immigration enforcement, that I hope the issues discussed today get taken up by the wider immigrant rights community, and by legislators and policymakers who are supporting positive comprehensive immigration reform. As we wait to see when and how Congress will take up immigration reform again, today's discussion is an important reminder that a true commitment to creating a more humane and just immigration system must include working to address the immigration enforcement issues raised here. Thank you all for your contributions. □



Jerome Cohen at his Cape Cod house, 2005. His Chinese name (above) means "beneficent."

CHINA'S LEGAL LION

It is one of the iconic images of the 20th century: President Richard Nixon steps off a plane in Beijing and shakes hands with China's Prime Minister Zhou Enlai in 1972, ending decades of hostility and signaling the beginning of a U.S. rapprochement with China. But less known is the role that Jerome A. Cohen, a China law scholar, played in this diplomatic coup.

Almost four years earlier, just days after Nixon had won the presidential election, a small group of China experts from Harvard and MIT, including Cohen, delivered a confidential memorandum to a Nixon foreign policy adviser named Henry Kissinger. The memo's first recommendation was that the president move toward reconciliation with China by sending a trusted emissary to hold secret and, if necessary, deniable meetings with Chinese officials. Afterward, Cohen, chair of the China scholars group, met occasionally with Kissinger at the White House to discuss implementing the memo, but Kissinger, a former colleague at Harvard, "held his cards close," says Cohen. So Cohen was surprised, and elated, when Nixon

BY PAMELA KRUGER

PORTRAIT BY JOAN LEBOLD COHEN

announced his plans to visit China and disclosed Kissinger's secret meeting with Chinese officials. Watching the televised footage of Nixon's arrival in China, Cohen found himself near tears. "This was revolutionizing U.S.-China relations," he says, "something I'd been working toward for 12 years."

Nixon's trip, of course, not only marked the opening of U.S.-China relations, it also set China on a path to becoming a world economic power. And as China ascended, so did Cohen's legal career; his specialty—Chinese legal studies—went from an obscure, backwater academic discipline to a high-profile, high-stakes area of expertise. By any standard, his career has been remarkably productive and influential: Through his 17 years at Harvard Law, where he founded the nation's first East Asia legal studies program, his nearly two decades as a deal-making partner at Paul, Weiss, Rifkind, Wharton & Garrison, and his most recent years at NYU Law, which he joined in 1990, Cohen, 79, has had a significant impact on legal affairs in East Asia, particularly in China.

As a human rights advocate, he has helped secure the release of several political prisoners in the region, such as Annette Lu, who would become a vice president of Taiwan, and Kim Dae-jung, who would serve as president of South Korea and win the Nobel Peace Prize. As an attorney practicing international business law, he achieved several firsts, including becoming the first Western lawyer to practice in Beijing under communist rule.

"If you look at the field of China law—now an enormous community— it's kind of shaped like a pyramid," says a former student. "And Jerry sits at the top."

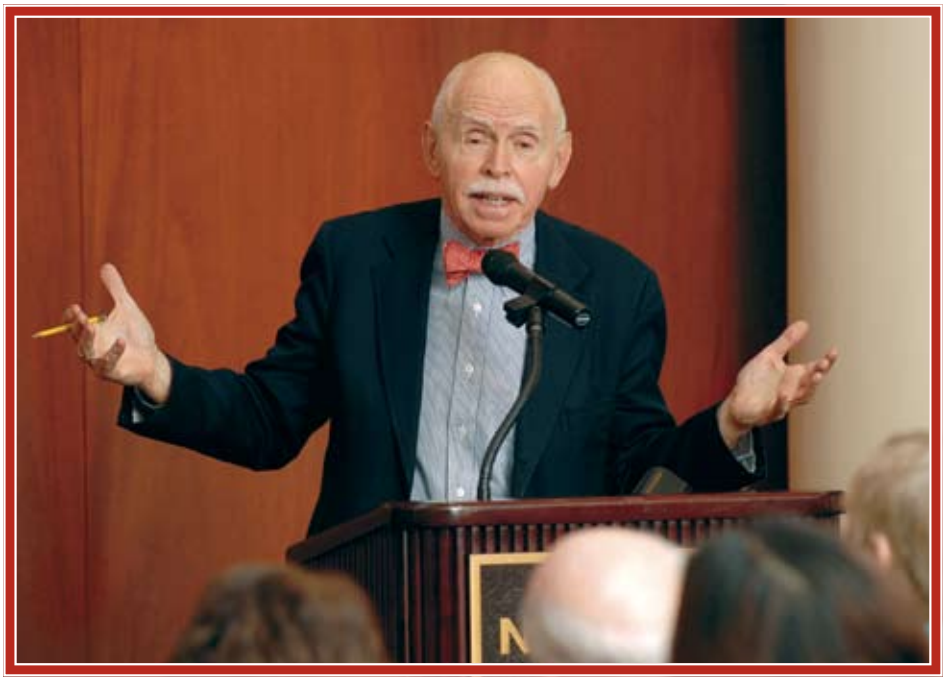
Known as the "Godfather" of Chinese legal studies because he was a pioneer in the field and a mentor to so many, Cohen has taught and inspired literally hundreds, many of them now leading scholars and policy makers, including William Alford, director of East Asian Legal Studies at Harvard, Ma Ying-jeou (LL.M. '76), Taiwan's president, and Clark Randt Jr., the recent U.S. ambassador to China, all of whom Cohen taught at Harvard.

As a result of NYU's LL.M. program, which annually draws some 40 students from China and another dozen from Taiwan, as well as his frequent speaking and teaching engagements overseas, Cohen acolytes can be found in law firms, in law schools, and throughout the civil and criminal justice system in China and Taiwan, and he is a virtual celebrity in Chinese legal circles. "If you look at the field of China law—now an enormous community—it's kind of shaped like a pyramid," says Stephen Orlins, 59, a former Cohen student from Harvard and president of the National Committee on U.S.-China Relations. "People in their 20s are at the base. People like me are in the second rung near the top. And Jerry sits at the top. Jerry is the father of it all."

A MASTER NEGOTIATOR

With his full moustache, propensity for bow ties, and friendly, can-do demeanor, Cohen has always stood out in China. But due to his ability to read people and connect, regardless of their age, social status, or nationality, he has managed to bridge the cultural divide and broker solutions.

Everyone who knows Cohen remarks upon his graciousness and generosity, his consistent willingness to make introductions or give advice to people in the field. "He is such a prince," says Sharon Hom '80, executive director of Human Rights in China, who recalls how Cohen spent hours vetting the organization's draft report on China's opaque state-secrets system. "Jerry always has time for people, not just famous people," says Ira Belkin '82, who runs the Ford Foundation's Law and Rights program in China and still remembers attending an NYU Law event in Shanghai years ago and being impressed at how Cohen had a personal relationship with every student. Indeed, this knack for cultivating relationships, whether with Chinese bureaucrats, American politicians, human rights activists, or young law students, is a key factor in his influence.



Cohen always uses his relationship-building skills in service of his higher goal: pushing for a genuine rule of law in China. Cohen has consistently supported China's international ambitions, advocating for normalization of relations in the 1970s, negotiating Chinese joint ventures for multinationals through the 1980s and 1990s, and pushing for China's admission to the World Trade Organization in 2001, because he believes that through international contacts, contracts, and cooperation, China will gradually adopt and follow the rule of law. But Cohen also has been willing to point out when China falls short—and in recent years has adroitly used the media to put pressure on the government. Whether pointing out corruption in China's international arbitration body, as he did in 2005, or campaigning day-in, day-out for the protection of Chinese defense lawyers from government harassment and imprisonment, Cohen has often named names, publicly challenging the responsible government officials to do the right thing.

Quite remarkably, Cohen manages to still be seen as a "friend of China," free to speak, lecture, and travel in the country, even while he has become one of the most vocal critics of human rights abuses

and corruption in China's legal system. "I am walking a fine line," says Cohen. "Some people there don't appreciate my criticism. But I've got a long track record in China. People know that I've invested many years in improving relations with China."

Many, such as Orlins, point to Cohen's masterly way of framing his arguments to the Chinese. "He never lectures them on democracy or some Western concept," says Orlins. "He points to their laws and talks about how they need to conform to them. There is a genius to what he does." Chenguang Wang, former dean of China's Tsinghua Law School who also has been a Global Visiting Professor at NYU Law, agrees, adding, "I am really fascinated with how Jerry communicates. He is so skillful and knows exactly how to get his point across."

And Cohen's ability was obvious to all from a young age. After graduating Phi Beta Kappa from Yale in 1951 and spending a year studying international relations on a Fulbright Scholarship in France, he went to Yale Law School, where he served as editor-in-chief of the *Yale Law Journal* and graduated number one in his class. He then clerked at the Supreme Court—first for Chief Justice Earl Warren in 1955, then for Associate Justice Felix Frankfurter the following year. Frankfurter, with his willingness to speak out, became a role model; he also served as godfather to Cohen's two eldest children, Peter, 52, a Cambridge, Massachusetts, real estate attorney, and Seth, 50, a New York City doctor. (Cohen's youngest son, Ethan, 48, owns a New York City art gallery, the first in the U.S. to specialize in contemporary Chinese art.)

After stints as an associate at Covington & Burling, as an assistant U.S. attorney for the District of Columbia, and as a consultant to the U.S. Senate Committee on Foreign Relations, Cohen had the résumé, smarts, and connections for the kind of political career that would have made his parents proud. But he chose to teach law at the University of California, Berkeley. "I always wanted to be able to speak freely, and academic tenure provided that," he said.

A FAMILY ALBUM
Clockwise, from upper left: A young Jerome with his parents, Philip and Beatrice, and brother Burton, circa 1940; Jerome and Joan at a moon gate, a traditional feature of Chinese gardens, 1979; Joan and Jerome take their three sons to the Great Wall for the first time in 1972, just months after President Nixon's momentous visit; the Cohens' 1963 holiday card, from Jerome's first Hong Kong sabbatical.

FROM NEW JERSEY TO BEIJING

Cohen's ascent to China law scholar was not something anyone in his family would have predicted. He grew up in Linden, New Jersey, a middle-class suburb of Newark. His father, a Republican lawyer, had served as city attorney but was frustrated from higher office due to subsequent Democratic dominance during the Roosevelt years. His mother, hoping Jerry would go into politics, once suggested he drop his Jewish surname and run for office as "Jerome Alan." But Cohen, always preternaturally confident, brushed off the idea. "Changing my name seemed counter to the best American traditions," he says. "I also believed that ability was more important than background."

A year later, in 1960, the Rockefeller Foundation's president, Dean Rusk, who had been assistant secretary of state for Far Eastern affairs during the Korean War, offered a four-year grant for a law professor at Berkeley to study China. Frank Newman, the incoming dean, asked Cohen to help find someone for the spot. Cohen spoke to several prospects but couldn't persuade anybody to take up such an arcane discipline as Chinese legal studies. In the process of trying, though, Cohen says, he persuaded himself. "This was a chance to do something distinctive. I wanted to be a pioneer."

His wife, Joan, who had a B.A. in art history from Smith College and was then an at-home mom of two (with a third son to be born in 1961), says she gave Cohen her blessing but told him, "You're

JOAN LEBOLD COHEN

FEATS IN THE TWO KOREAS

TO FULLY UNDERSTAND CHINA, COHEN believes it is necessary to study neighboring countries that share China's Confucian-Buddhist heritage. So only months after visiting China for the first time in 1972, Cohen wangled a visa and became the first American academic to visit North Korea, taking his family with him. "I always believed that a lot of the American propaganda about North Korea was exaggerated," says Cohen. "Unfortunately, I learned it had a factual basis."

When the Cohens arrived in North Korea, they were squirreled away to a remote estate with armed guards and were only allowed to visit museums and other public spots after they were emptied of North Koreans. "We were essentially under house arrest," Cohen's son, Ethan, then 11, remembers. (Since Beijing was a main route to North Korea then, the family also visited China on that trip.)

It wasn't until 1997 that Cohen was invited back to North Korea. He has since brought over a North Korean delegation to speak at the Council on Foreign Relations, where he is an adjunct senior fellow, and he—along with NYU Law Professor Stanley Siegel—has taught North Korean officials the basics of international business law in Beijing. "I've always felt that we should bring North Korea into the world, just as we did with China," he says.

Cohen's experience with South Korea, however, was even more dramatic, as he intervened in the Korean Central Intelligence Agency's (KCIA) audacious kidnapping of Kim Dae-jung, a friend of Cohen's and a South Korean activist who later became one of the country's most revered presidents and won the Nobel Peace Prize in 2000. In August 1973, Cohen received an urgent call from Kim's U.S. aide, saying Kim had been kidnapped in Tokyo by KCIA agents and would be killed. Would he call President Nixon's aide Henry Kissinger for help? Cohen says he did, and that Kissinger promised he would do everything he could.

A few hours later, Kim reportedly was on a boat, bound, blindfolded, with weights attached to his wrists, about to be dropped into the sea to die, when suddenly he heard shouting and a mysterious aircraft overhead. Kim was subsequently released in Seoul.

Press reports credited then-U.S. Ambassador to South Korea Philip Habib for warning South Korea's president that he would face the U.S.'s wrath if Kim were killed. Kissinger hasn't publicly discussed his role. Even Cohen isn't sure what action Kissinger took, though he says Kim later told a Korean magazine that the appeals to Kissinger made by Cohen and Edwin Reischauer, a noted Harvard Asian studies scholar and former U.S. ambassador to Japan, helped save his life. Indeed, the Kim Dae-jung Presidential Library and Museum in Seoul plans to display Cohen's recollections of his role. Kim died in August.

picking the one field where no firm would ever want to consult you." Many of Cohen's friends and colleagues "thought I must be having a nervous breakdown," says Cohen, noting China was then completely closed off from the West. His old mentor Justice Frankfurter even wrote Cohen, warning him that he was "throwing away" all his hard-earned knowledge of U.S. law.

Cohen's faith—in himself, his new vocation—was not shaken, and in fact, as was his nature, he seemed to gain strength in the face of opposition. After getting over Frankfurter's barb, Cohen wrote him a note saying he understood Frankfurter's reaction because the retiring Berkeley dean—whom Frankfurter disliked intensely—had told Cohen the same thing. Frankfurter, Cohen says, then dashed off a handwritten letter: "Given the role China is destined to play in your lifetime and that of your children, you tell him to go to hell!" It was vintage Cohen: With his good-natured sense of humor and astute insight into people, he'd gotten exactly the response he'd wanted—and proven a point.

So, just after his 30th birthday, Cohen began studying Mandarin in the basement of his Berkeley house. "It was August 15, 1960, 9:00 a.m.," says Cohen, who has a razor-sharp memory for names, dates, and events. Joan, meanwhile, began taking a course in Chinese studies at Berkeley, which would lead to her own career as a photographer and an art historian specializing in modern Chinese art. (The couple would collaborate on *China Today and Her Ancient Treasures*, an illustrated book aimed at newcomers to Chinese culture. Chosen by the Book-of-the-Month Club as an alternate selection, it was first published in 1974.)

"I am walking a fine line," Cohen says. "Some people there don't appreciate my criticism. But I've got a long track record in China."

By 1963, Cohen, near-fluent in Mandarin, was on sabbatical in Hong Kong, interviewing refugees from mainland China about legal procedures used in criminal cases. The result was his first book, *The Criminal Process in the People's Republic of China, 1949-1963*, widely praised for detailing criminal procedure in China and analyzing its connection to Confucian and imperial Chinese traditions and social norms and practices. In 1964, he joined Harvard Law School and moved to Cambridge.

Like many Asia scholars in the 1960s, Cohen lectured, gave interviews, and wrote articles opposing the reflexive anticommunism of the time. But unlike many of his fellow academics, Cohen also had a gift for negotiation and saw an opening to broker a solution to a notorious Cold War case that had been a sore point in U.S.-China relations. In 1952, a Yale classmate of Cohen's, John Downey, along with another American, Richard Fecteau, had been captured and imprisoned by the Chinese government. China had insisted that Downey and Fecteau were CIA agents on a secret mission to foment rebellion in China. The U.S. denied the charge, claiming they were Army civilian employees whose flight went off course from South Korea. But Cohen remembered attending a CIA recruiting session at Yale in early 1951, where a CIA recruiter spoke vaguely of a possible mission in China. Cohen decided not to sign up, but it was known that a few students, including Downey, did.

At a Yale reunion, Cohen's classmates asked Cohen to work on Downey's release from prison. In summer 1971, Cohen appeared before the Senate Foreign Relations Committee and wrote a *New York Times* op-ed, revealing what he knew about the Downey and Fecteau case and urging the U.S. government to come clean. (During that spring, he'd also floated this idea to Kissinger and Huang Hua, then China's ambassador to Canada.) "I knew how much China resented the hypocrisy of the U.S.," says Cohen. "I thought if I could get the U.S. to finally tell the truth, that would satisfy China and they'd release" Downey and Fecteau.

In December 1971, Fecteau was released. Downey was released in March 1973, six weeks after Nixon, for the first time, publicly admitted Downey's CIA affiliation.

FINALLY, A VISIT TO THE MAINLAND

Although it is known that Kissinger discussed the Downey case during his secret talks with the Chinese during the summer of 1971, the extent of Cohen's influence is unclear. Kissinger didn't even acknowledge the existence of Cohen's 1968 memorandum on China until the 1979 publication of his White House memoir. Even then, he downplayed the memo's importance, suggesting that the China scholars didn't understand all of the geopolitical subtleties.

But for Cohen, getting credit was never as important as getting access: What he most wanted then was to finally visit China and learn the inner workings of the legal system he'd been studying from afar. In May 1972, Cohen made his first visit to China, as part of a small delegation of the Federation of American Scientists. It was thrilling. "So few Americans were allowed to visit that Zhou Enlai personally approved each visa that year," he says.

Cohen and a few others had a four-hour dinner with Zhou, in which they discussed the possibility of academic exchanges. But Cohen knew that legal exchanges wouldn't be imminent. Upon his return, he wrote in an essay, "The first thing to learn about legal education in China is that there isn't any." Their constitution, he noted, was mostly "an unenforceable collection of political slogans and principles." Bookstores had no legal section. There were no law professors to meet—since the Cultural Revolution, they'd been sent to work on farms or shuttered at home.

In part because of Watergate, the reconciliation process stalled. Cohen's real adventures in China would not begin until Deng Xiaoping became China's leader and President Jimmy Carter signaled his readiness to complete the process of normalization begun under Nixon. As usual, Cohen saw an opening and seized it, suggesting that Senator Ted Kennedy, a champion of normalization, go with him to China to meet Deng. But when they arrived in Beijing in late 1977, Deng was ill with the flu, and his aides told

ADVENTURES IN CHINA

Cohen enjoys rare access during the early days. From top: One of a few American scholars allowed to travel to China in June 1972, he meets Prime Minister Zhou Enlai; Cohen congratulates a Beijing Economic Commission official who has just completed Cohen's business and contract law course in 1980; Cohen and law firm colleagues meet in 1981 with Xiao Yang, center, the head of the Beijing Economic Commission. Xiao made Cohen a once-in-a-lifetime deal: In exchange for teaching Xiao's aides the law, Cohen would become the first Western attorney allowed to practice in Beijing.

JOAN LEBOLD COHEN

Cohen he didn't want to set a precedent of meeting with individual U.S. senators. Cohen remembers Kennedy was upset and warned Cohen, "I will consider this trip a failure if I don't meet Deng."

Cohen swung into action. Knowing that he and Kennedy were under constant surveillance, Cohen shrewdly staged some conversations with Kennedy in his hotel suite in which Kennedy complained about the impact on U.S. and China negotiations if he, one of China's true friends, did not get to meet with Deng. Then Cohen called home to Joan in Massachusetts. "I spoke—loud and slow—about all the years I'd invested in getting Senator Kennedy on the right side of China issues, and now Deng's handlers were messing things up," he says. The ploy worked; Deng had a 90-minute meeting with Senator Kennedy, his family, and Cohen. (On January 1, 1979, the U.S. and China officially established diplomatic relations.)

and Cohen's phone began ringing off the hook from Fortune 500 companies interested in setting up joint ventures in China.

Some of these calls, however, came as a direct result of Cohen's gift for building relationships. A former Chinese tutor of his at Harvard, for instance, put him in touch with Xiao Yang, who headed the Beijing Economic Commission. Xiao and Cohen worked out a deal: In exchange for teaching 30 of Xiao's commerce officials basic contract and business law a few hours a week, Cohen would receive permission to live and practice in Beijing, something no Western lawyer had done since the People's Republic of China was established in 1949.

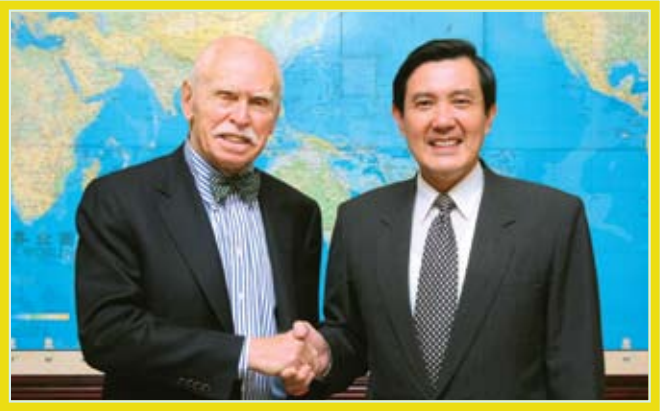
Even Cohen's first major client, General Motors, which wanted to open up a $1 billion heavy-truck manufacturing plant in China, came to him through an acquaintance he'd made. Bob Rothman,

A FORCE IN TAIWAN

NOWHERE HAS COHEN'S INFLUENCE been felt more acutely than in Taiwan. Taiwan's current president, Ma Ying-jeou (LL.M. '76), and the country's former vice president Annette Lu were Cohen's students in the late 1970s.

In 1985, Lu, a leader in the democratic reform movement, was in a Taiwanese prison, serving a 12-year sentence for sedition. At Cohen's request, Ma, then an aide to President Chiang Ching-Kuo, and Cohen visited Lu. Shortly after, Lu was freed; she has credited Cohen, who asked Ma to push for her release, as well as the efforts of human rights groups.

Also in 1985, Cohen served as a pro bono representative of the widow of Henry Liu, a Taiwanese-American writer murdered after sharply criticizing Taiwan's one-family rule. After a Taipei district court convicted reputed gangsters of the murder and gave them life sentences, Cohen publicly dismissed that trial as "a well-rehearsed performance," designed to hide the government's role. During a second trial before a higher court (life sentences in Taiwan are automatically reviewed), Cohen was permitted to cross-examine the defendants and the implicated military officials. The three defendants' sentences were upheld, and Taiwan's military intelligence chief was later convicted for his role in the murder. Under pressure from the U.S., Taiwan lifted martial law in 1987.



OFFICE OF THE PRESIDENT, REPUBLIC OF CHINA (TAIWAN)

JOAN LEBOLD COHEN

A NEW ERA OF U.S.-CHINA RELATIONS

While few China experts have met both Deng and Zhou, as Cohen has, what established Cohen as a China insider were the years he spent as a deal-making attorney in the country. "I don't hang around with the Chinese leadership. They think I am not a person who is entirely reliable," Cohen says, explaining he never tried to cultivate relationships with the top leaders, fearing it might hamstring his ability to speak freely.

When Cohen tells the story of how he became the first Western lawyer to practice in Beijing, he notes he happened to be in Hong Kong on a sabbatical in January 1979, with a sideline consulting at Coudert Brothers, a New York law firm trying to expand its presence in Asia. Deng had just announced a raft of economic and legal reforms that were opening China to foreign trade and investment,

a GM attorney, had heard Cohen lecture at the University of Michigan while an undergraduate majoring in Chinese in the late 1960s. He then wrote Cohen for career advice. Cohen wrote back, advising him to apply to law school and sending him several publications to help Rothman with a paper he was writing about Chinese marriage law. Rothman never forgot it.

"I was so impressed that he'd bent over backwards for some kid he didn't know," says Rothman. Though the company never got further than a memorandum of understanding on that plant, GM retained Cohen as an adviser off and on for nearly a decade.

Living at the Beijing Hotel, Joan and Jerome found themselves under constant surveillance. Their office and home phones were tapped, their rooms bugged. Visitors to their hotel suite were often interrogated on the way in—and on the way out. The couple,

however, made a decision not to be intimidated. "We knew that at any point, we could be asked to leave. We wouldn't know why or when it might occur, so we just went on with our lives," says Joan.

In 1981, with his leave at Harvard up, Cohen decided to resign from Harvard and join the New York firm Paul, Weiss. "I just couldn't leave China," Cohen recalls. "I felt this was an historic moment, and if I went back to Harvard, I'd have to ask my former students in practice what is really going on, instead of being the person leading the charge." (Joan's career, teaching and writing about contemporary Chinese art, was flourishing, too. She would later publish *The New Chinese Painting 1949–1986*, as well as other books.)

Spending much of the year in Hong Kong (with a small apartment in New York and a summer house in Cape Cod), Cohen devoted the next few years to making deals and matching wits with Chinese officials, many of them party functionaries with no legal experience. "At first, I would go to meetings and people would just stare at us, blank faced. They'd never seen a Westerner before. They didn't know if they could trust us," he says. He learned that it helped if he could explain his positions using "a few old ideological maxims," such as Deng's saying, "Speak truth to facts." He also found that if he could "say that it was good for foreign investment, and say it with a straight face," his suggestions would often be adopted. "Often these slogans were useful tools, especially when dealing with people who weren't lawyers but were guided by [Communist Party] clichés," he says.

A favorite Chinese negotiating tactic, Cohen says, would be to insist that they couldn't agree to a clause because of a regulation, but if you asked for a copy, the Chinese would claim it was *nei bu*, an "internal document," restricted and illegal to show to foreigners. "You wouldn't know if the instructions required the result they were advocating, or if the document even existed," Cohen says, adding he supported China's entry into the WTO, knowing that that would lead China to agree to conform to international standards, including doing away with the use of "internal documents."

AN ADVOCATE FOR THE RULE OF LAW

On June 4, 1989, China's army crushed the student protest movement centered in Tiananmen Square, and deal-making ground to a halt. Paul, Weiss closed its Hong Kong office. Drawn to the NYU School of Law's growing global emphasis, Cohen joined the faculty in 1990, while staying engaged at Paul, Weiss until his 2000 retirement.

At NYU Law, he worked to build up the school's Asia legal studies program, recruiting Frank Upham, a former student and an expert in Japanese law, as well as bringing over numerous visiting scholars and professors from East Asia. One of Cohen's signature courses became Legal Problems of Doing Business with China and East Asia; drawing on Cohen's unique experiences, the course also has included his frontline view of how Chinese business disputes can turn ugly.

After China established capital markets in the early 1990s, the Chinese had more opportunities to accumulate wealth, but Cohen says the system of *guanxi*—"connections," or the old boys' network—often meant that local authorities would sometimes collude with, or against, Chinese business executives embroiled in disputes.

In China, Cohen's views carry great weight. "Jerry is the guardian of the conscience of the intellectual," says a Shanghai attorney.

In the mid-1990s, an American investment firm brought Cohen in as a legal adviser after a Chinese executive involved in its joint venture was kidnapped and illegally detained by local authorities; Cohen says the officials were looking to prove corruption charges leveled by jealous ex-employees. Cohen met with local prosecutors and went over with them "line by line" China's then-recently amended criminal procedure law, including the provision allowing the right to counsel. "The prosecutor looked at me and said, 'Our job is to get corrupt people! We don't have to pay any attention to this procedure!'" says Cohen, who then appealed to the national prosecutors' office to investigate—to no avail.

The local authorities typically have the last word in such disputes. For despite Americans' impression that China's leadership rules from Beijing with an iron fist, Cohen says the provinces and local governmental institutions often function as quasi-independent "feudal baronies," in part because of the system of local protectionism.

As a result of such cases, since 1999, Cohen has focused on reform of the criminal justice system—what he calls the "weakest link" in China's legal system. Even when Chinese officials do follow the existing rules, police still are permitted by law to detain suspects without approval of an outside agency, and suspects have no right to silence. Vaguely worded criminal laws against "endangering state security" and "inciting subversion" enable the regime to

More recently, Cohen's advocacy of the Rule of Law has sometimes put him at odds with officials from both the ruling and opposition parties, and even the Ma administration. Ma was elected president in March 2008 and chairman of the ruling Kuomintang party in July 2009.

Last November, Taiwan's past president (and Ma's political foe) Chen Shui-bian was charged with crimes that allegedly netted him and his family millions. While Cohen applauded the arrest, saying it showed that Taiwan would uphold the law, he later criticized the government's handling of the case.

TAIWAN INSIDER
Cohen visits President Ma in his office in May 2008, days after Ma's inauguration. Widely known as Ma's former teacher, as well as a legal advocate, Cohen is often sought out by the Taiwanese press.

First, Cohen condemned as unfair the switch of the case from a three-judge court that released Chen without bail, pending prosecution, to a court that kept him detained for many months, before and during the trial. Then, Cohen criticized the "increasingly disturbing circus atmosphere," citing reports that at a dinner attended by the minister of justice and others in the legal elite, prosecutors performed a skit mocking Chen. Cohen called on Ma to take swift action to ensure Chen's right to a fair trial.

Through a spokesman, Ma responded that he would not intervene, though he "hopes that the judiciary will behave in a way that does not induce improper political reactions on the part of the public." At press time, Chen's trial was still underway. He has denied all charges.

impose harsh sentences whenever it desires. Amnesty International, in fact, calls China the world's "top executioner," estimating some 1,700 death penalty executions, though probably many more, each year. China classifies the exact number as a state secret.

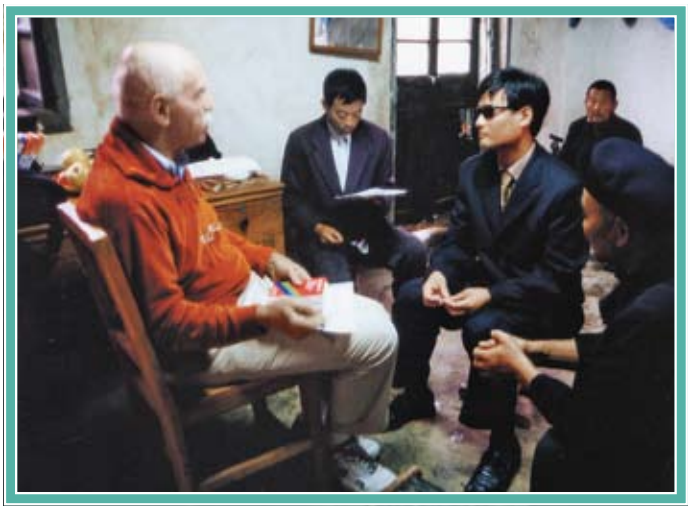
Cohen began working as a legal adviser on several key human rights cases in China. One of them involved Yongyi Song, a Dickinson College librarian and China scholar researching the Cultural Revolution who was arrested by secret police in Beijing in August 2000 and held in prison on charges of "purchasing intelligence and exporting it to a foreign country." (Song said he bought old newspapers, books, and Red Guard wall posters from the late 1960s.)

Working pro bono for Song's wife and Dickinson College, Cohen arranged for a Chinese lawyer to represent Song. Then, he masterminded a public relations campaign, enlisting the support of Senator Arlen Specter, as well as launching a petition calling for Song's release, which garnered 176 signatures from China scholars around the world. Less than a month after Cohen joined the case, Song was released in January 2001. "If you see Jerry, please tell him, 'Thank you, again,'" says Song, now a research librarian at California State University in Los Angeles.

More recently, though, China has been less willing to bend. Since 2005, Cohen has crusaded for the release of Chen Guangcheng, a blind human rights defender placed under house arrest and then imprisoned after filing a lawsuit on behalf of thousands of Chinese women who underwent forced abortions and sterilizations. In 2003, Cohen met Chen, known as a "barefoot lawyer" because he is self-taught in the law and provides free legal counsel to peasants, and Cohen became an ardent champion of his work. After meeting Chen through Cohen, Chenguang Wang, Tsinghua Law School's former dean, says he instituted a program for Tsinghua law students to spend their summers training other "barefoot lawyers" in rural communities in China.

But in 2005, Chen was placed under house arrest; the next year, he was tried and convicted of trumped-up charges—property destruction and "interfering with public order"—and sentenced to four years in prison. Cohen has been writing and speaking out about the case ever since, even in China.

At a 2007 legal conference in Beijing, he held up a T-shirt reading "Free the blind man, Chen Guangcheng" and spoke about the case. "I wanted to make the people at the conference feel guilty," he explains. "There are criminal justice specialists in China who don't know what's going on in their own country."



A FRIEND TO MANY
From top: Cohen visits Chinese "barefoot lawyer" Chen Guangcheng in his rural village home in 2003; Cohen and his former student Clark Randt Jr., then U.S. ambassador to China, socialize with their families at Randt's Beijing residence in 2002.

In fact, his views carry weight with the Chinese legal establishment. "Jerry is the guardian of the conscience of the intellectual," says Henry Chen (LL.M. '03), a partner at MWE China Law Offices in Shanghai, pointing to Cohen's criticisms of the China International Economic and Trade Arbitration Commission (CIETAC), China's powerful international commercial arbitration body. In a speech at a 2004 legal conference in Xiamen and a 2005 article for the Hong Kong–based *Far Eastern Economic Review,* Cohen—the first foreigner to advocate before CIETAC in 1985—called out the commission for corruption, citing specific instances, and he said he'd advise clients to stay away from the commission, even though he was one of only about 100 foreigners appointed as CIETAC arbitrators. Soon after, CIETAC adopted some of the reforms Cohen suggested, but Cohen learned he would not be reappointed to the body. (At a 2007 arbitration conference in New York, Cohen says, CIETAC's new leader publicly vowed Cohen would be reappointed. "I am still waiting," Cohen says.)

Such retribution has been rare, and if he is worried about losing the right to travel, teach, and speak in China, he isn't showing it. The Law School's U.S.-Asia Law Institute, established in 2006 by Cohen and Upham, continues to promote legal reform. With the help of senior research fellows Margaret Lewis '03 and Daniel Ping Yu, as well as others, the institute has brought over Chinese judges, lawyers, prosecutors, and academics to study such hot-button issues as procedural safeguards in death penalty appeals. Writing a twice-monthly column for the Hong Kong–based *South China Morning Post*, Cohen also keeps the spotlight on legal abuses, such as the case of Gao Zhisheng, a missing Chinese human rights lawyer who was last seen in the custody of State Security agents in February.

Despite the recent spate of human rights abuses in China, Cohen has no thoughts of retiring and remains optimistic that China will create a genuine rule of law. "Seeing the changes I've seen in China over the last 40 years, I know that it is possible," he says. "And what better use for my life? I've engaged in meaningful work, and I am having an impact." □

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Pamela Kruger is a New Jersey-based writer and editor.

JOAN LEBOLD COHEN

TIME & SPACE TO THINK

Announcing the Straus Institute for the Advanced Study of Law & Justice and the Tikvah Center for Law & Jewish Civilization, and their fellows.

A HISTORIC 1830S BRICK TOWNHOUSE AT 22 Washington Square North has become the newest locus of intellectual activity at the NYU School of Law. Two centers, both based in the same newly renovated landmark building, have been launched simultaneously: the Straus Institute for the Advanced Study of Law & Justice, and the Tikvah Center for Law & Jewish Civilization.

Directed by University Professor Joseph Weiler, who is also Joseph Straus Professor of Law, the Straus Institute offers generous fellowships to top scholars from diverse fields, with the intent of creating an intellectual haven for free interaction among multidisciplinary thinkers while retaining a broad focus on issues of law and justice. It is an academic format embodied by a group of institutes of advanced study, the most famous of which are located in Berlin, at Stanford University, and near Princeton University (the latter served as Albert Einstein's academic home, where he pursued a unified field theory in physics during the last two decades of his life). The Straus Institute will support high-level research and scholarship without requiring teaching commitments of its fellows. Two-thirds of each year's fellows will pursue scholarship related to an annual theme; in 2009-10, the topic will be the emerging legal field of international governance.

The new institute was funded by Daniel Straus '81, a member of the Law School's board of trustees, and his wife, Joyce Straus. "In a way, it's the ultimate ivory tower," Weiler said. "You're telling people, 'Come. Spend a year here. Think.' It's not an immediate action or reaction kind of thing. But it's fundamental deep thinking about serious social issues." Throughout the year, forums, colloquia, and seminars will allow Straus Fellows to engage with the Law School community.

Like the Straus Institute, the Tikvah Center, directed by Gruss Professor of Law Moshe Halbertal and Weiler, will host eminent scholars. The foundational premise of the center is that the study of Jewish law can profit immensely from insights gained from general jurisprudence, and that Jewish law and Jewish civilization can provide illuminating perspectives on law and legal issues of true academic and social significance. The Tikvah Center will showcase

fellows' scholarship through forums and an annual conference. Beginning in 2010, the center will facilitate a Master of Studies in Law program focused on law and Jewish civilization; students will not need a prior law degree. An undergraduate outreach program will feature courses taught in NYU's College of Arts and Science by instructors affiliated with the center. The Tikvah Center is made possible by the Tikvah Fund, a private foundation that supports Jewish intellectual life.

STRAUS FELLOWS

At-Large

MARTA CARTABIA is a professor of constitutional law at the University of Milano-Bicocca Faculty of Law. She received her Ph.D. in Law from the European University Institute in Florence, Italy, and was a clerk in the Italian Constitutional Court from 1993 to 1996. Her most recent publications include *I Diritti in Azione* (2007) and Europe and Rights: Taking Dialogue Seriously," in the *European Constitutional Law Review* (2009).

In recent years, legal changes affecting some of the most crucial sectors of social life have occurred in national and international courts. Many "new fundamental rights" have been created, covering a wide range of subjects, from environmental emergency to immigration law to the role of religion in the public sphere. The recognition of new rights has significant consequences on the use of different standards of review and burdens of proof. By analyzing various judicial decisions, Cartabia aims to discover the conceptual, legal, and procedural matrix of the new rights.

MEIR DAN-COHEN is Milo Reese Robbins Chair in Legal Ethics and an affiliate of the Department of Philosophy at the University of California, Berkeley. Dan-Cohen received his LL.B. from Hebrew University and clerked for the Supreme Court of Israel. He received an LL.M. and J.S.D. from Yale Law School. Dan-Cohen has written *Harmful Thoughts: Essays on Law, Self, and Morality* (2002) and *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (1986).

Dan-Cohen's research draws on a tradition claiming that human beings are self-creating: the self is the largely unintended by-product of human practices, including law and morality. The recognition that we are the products as well as the authors of our norms complicates our normative agenda. In devising behavior-guiding norms we must explore not only their effects on what we do but also on who we are: what subjects will emerge from the activities generated by a particular set of norms? And what considerations ought to guide this constructive aspect of our normative engagements?

ROBERT GEORGE is McCormick Professor of Jurisprudence and director of the James Madison Program in American Ideals and Institutions at Princeton University. He has served on the President's Council on Bioethics and as a presidential appointee to the U.S. Commission on Civil Rights. George was a judicial fellow at the U.S. Supreme Court. He is co-author of two recent books: *Embryo: A Defense of Human Life* (2008) and *Body/Self Dualism in Contemporary Ethics and Politics* (2008).

Drawing upon sociological, historical, and philosophical sources, George will work on a book presenting a natural law argument for marriage as the lifelong conjugal union of man and woman as husband and wife. In addition, he will answer critics' arguments against this understanding of marriage, including those by proponents of same-sex and polyamorous marriage, and show that marriage, soundly understood, is a great good for individuals, spouses, children, and society.

MOSHE IDEL is Max Cooper Professor in Jewish Thought at the Hebrew University of Jerusalem and a senior researcher at the Shalom Hartman Institute. He received the 1999 Israel Prize for Jewish Thought and the 2002 Emmet Prize, and has been a member of the Israeli Academy since 2006. Among his publications are *Kabbalah: New Perspectives* (1988) and *Ben: Sonship and Jewish Mysticism* (2007). Idel is both a Straus and Tikvah Fellow.

Idel distinguishes between three major modes of thinking in Judaism: the biblical, the rabbinic, and the speculative. He will concentrate his inquiries on the dynamics of the concatenation between these modes, emphasizing the intellectual superstructures that were added to legalistic structures, especially by thinkers who were both legalistic figures and kabbalists or philosophers. His research will explore the thoughts of Joseph Karo as well as examine the ideas in the *Sefer ha-Qanah*, a Byzantine 14th-century unsigned kabbalistic commentary on the commandments.

CAROL ROSE is Ashby Lohse Chair in Water and Natural Resource Law at the University of Arizona Rogers College of Law and the Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law at Yale Law School. Rose received an M.A. in political science from the University of Chicago, a Ph.D. in history from Cornell University, and a J.D. from the University of Chicago School of Law. Her publications include *Perspectives on Property Law* (2002) and *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994).

Rose, with contributions from Yale Law professor Richard Brooks, will research a book on racially restrictive covenants, their history, and what they tell us about the relationships between social and legal norms. She will also continue her research on the intersection of property rights, environmental law, and development.

Thematic

GRÁINNE DE BÚRCA is a professor of law at Fordham Law School. She was previously a professor of E.U. Law at the European University Institute. De Búrca co-edited *Oxford Studies in European Law* and co-wrote *E.U. Law*, which is currently in its fourth edition.

De Búrca will explore the ways the European project of integration-through-law has changed over time and examine the model of transnational governance developed by the European Union. The key role of the European Court of Justice

ARCHITECTURAL RENDERING: THOMAS W. SCHALLER

has changed in important ways. De Búrca will examine how the external dimension of E.U. governance has intensified as the E.U.'s interest in playing a more significant global role has grown. The ambiguous identity of the E.U. as an international actor, the place of law, and the relationship between political and judicial activity in shaping different aspects of this identity will also come into play.

ANDREW HURRELL is Montague Burton Professor of International Relations and Fellow, Balliol College, Oxford University. His book *On Global Order: Power, Values and the Constitution of International Society* (2007) won the 2009 International Studies Association Prize for Best Book in the field of international relations; and he has co-edited *Inequality, Globalization and World Politics* (1999) and *Order and Justice in International Relations* (2003).

Hurrell will focus on emerging powers and global governance, using as examples two countries, Brazil and India, and three regimes: the World Trade Organization, nuclear proliferation, and climate change. The project will be informed by a broad historical examination of the processes by which Western ideas have been transposed into different national and regional contexts. He will examine and evaluate the sorts of international society norms and global governance practices that have been, or might be, pressed both by emerging powers and other social forces.

ROBERT KEOHANE is a professor of international affairs at Princeton University. He has written *After Hegemony: Cooperation and Discord in the World Political Economy* (1984) and *Power and Governance in a Partially Globalized World* (2002). He won the 1989 Grawemeyer Award for Ideas Improving World Order and the 2005 Johan Skytte Prize in Political Science.

Keohane's scholarly research has focused on international regimes that regulate activities like world trade, accounting standards, and arms control. He has explored how our existing knowledge of the ways institutions operate effectively should influence the way designers of such institutions structure them. This topic will intersect with his work on accountability, legitimacy, and democracy in global governance.

BENEDICT KINGSBURY is Murry and Ida Becker Professor of Law, director of the Institute for International Law and Justice (IILJ), and director of the Program in the History and Theory of International Law at the NYU School of Law. He co-directs the IILJ's Global Administrative Law Research Project, a pioneering approach to issues of accountability, transparency, participation, and review in global governance.

Kingsbury will focus on developing and applying a theoretical account of the public law that should apply to global governance entities outside the state. This builds on his work with Richard Stewart on global administrative law. He will also research a second project concerning the production, use, and significance of indicators, particular quantitative ordinal rankings, as a technology of global governance. He will consider who participates in or should influence the production and use of particular indicators and how this power should be channeled and controlled.

JAN KLABBERS is a professor of international organizations law at Helsinki University and director of the Academy of Finland Centre of Excellence in Global Governance Research. His main publications include *The Concept of Treaty in International Law* (1996), *An Introduction to International Institutional Law* (2002), and *Treaty Conflict and the European Union* (2008).

Klabbers focuses on the problem of how to control the exercise of public power in international affairs. He aspires to develop a "constitutionalist" approach to public authority in global affairs that complements legal thought with virtue ethics and the character traits of those who exercise public power. He cites Martti Koskenniemi's "constitutionalism as mindset," Lon Fuller's "internal morality of law," and Onora O'Neill's approach of integrating principles with virtue as precedents.

DAVID KRETZMER is a professor emeritus of international law at Hebrew University of Jerusalem and a professor of law at the Transitional Justice Institute of the University of Ulster. His books include *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), *The Concept of Human Dignity in Human Rights Discourse* (co-editor, 2002), and *The Legal Status of the Arabs in Israel* (2002).

Kretzmer, in collaboration with Eckart Klein of Potsdam University, will be working on a critical study of the U.N. Human Rights Committee. The two will review the development of the committee's work and evaluate its functions and role in the international monitoring and protection of human rights.

DARYL LEVINSON is Fessenden Professor at Harvard Law School, where he teaches and writes primarily about constitutional law and theory. He is a faculty fellow of the Harvard Project on Justice, Welfare, and Economics, and he won the 2008 Sachs-Freund Teaching Award at Harvard Law School.

Levinson will explore the relationship between international and constitutional law. Held up to the benchmark of domestic law, international law is commonly perceived as a distinctively dubious form of law. Constitutional law is seldom subject to similar doubts, though the features of international law that lead to questions about its legitimacy are shared by constitutional law. International and constitutional law's differences from ordinary domestic law follow from the distinctive aspiration of public law regimes to constrain the behavior of state institutions, and the difficulty they face in not being able to rely on these same state institutions for implementation and enforcement. Levinson will explore these difficulties and the resources available to overcome them.

GIANLUIGI PALOMBELLA is a professor of legal philosophy at the University of Parma. He received his Ph.D. at the Scuola Superiore of Pisa and has been Senior Professorial Fellow at the European Union Institute. He has authored several books, including *L'autorità dei diritti* (2002) and *Dopo la certezza* (2006). Recently, he

published "The Rule of Law, Democracy and International Law" and *Ratio Juris* (2007), and co-edited *Relocating the Rule of Law* (2009).

Palombella's work will concern the rule of law as equilibrium between law-as-justice and law-as-power. He will explore the extent to which international rule of law, considered through global governance, provides for a noninstrumental and autonomous normativity irreducible to regulatory functions and teleology, how the public legality sphere is framed, and whether it should embody governance practices.

BETH SIMMONS is Clarence Dillon Professor of International Affairs and director of the Weatherhead Center for International Affairs at Harvard University. Her 2009 book, *Mobilizing for Human Rights: International Law in Domestic Politics*, provides quantitative and qualitative evidence that the ratification of several human rights treaties is associated with improvements in rights practices in countries around the world.

The first of Simmons's two research projects will look at laws, processes, and institutions that have developed over the last two decades relating to the international arbitration of investment disputes between foreign multinational firms and host governments. One of the goals will be to assess the extent to which international arbitration is perceived as effective and legitimate. Simmons will also be launching a project on international cooperation to address transnational crime.

RICHARD STEWART is a University Professor at New York University and director of the Hauser Global Law School Program and the Frank J. Guarini Center on Environmental and Land Use Law at the NYU School of Law. Stewart's scholarship and teaching focus on environmental law and policy and administrative law and regulation, including global administrative law and climate change regulation and finance. Stewart served as assistant attorney general for environment and natural resources at the U.S. Department of Justice, where he led the prosecution of Exxon for the *Exxon Valdez* oil spill. He was formerly chairman and currently serves as advisory trustee of the Environmental Defense Fund.

Stewart will be conducting research for a book on global administrative law. The book will include an overview of GAL development in response to the rise of global regulatory governance; an examination of GAL mechanisms of transparency, participation, reason-giving, and review; the adoption and role of mechanisms and norms in various global administrative bodies; and conceptual and normative foundations of GAL in relation to regulatory administrative efficacy, rights protection, global rule of law, global and domestic democracy, and global constitutionalism.

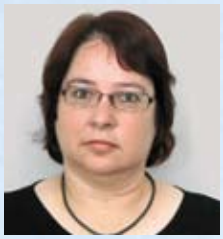
TIKVAH FELLOWS

YISHAI BEER is a professor at the Hebrew University of Jerusalem Faculty of Law, specializing in taxation, and a major general in the Israel Defense Force, currently serving as a corps commander. He is a former president of the Israeli Military Court of Appeals. Beer has an M.A. from the London School of Economics and a Ph.D. from Hebrew University.

SAUL BERMAN is an associate professor of Jewish studies at the Stern College for Women at Yeshiva University and an adjunct professor of law at Columbia University School of Law. Rabbi Berman received an M.H.L. from Yeshiva University, an M.A. in political science from the University of California, Berkeley, and a J.D. from the NYU School of Law. He is a contributor to the *Encyclopedia Judaica*.

BETH BERKOWITZ is an associate professor of Talmud and Rabbinics at the Jewish Theological Seminary. She earned her Ph.D. from Columbia University and has held postdoctoral fellowships in Yale University's Program in Judaic Studies and the University of Pennsylvania's Center for Advanced Judaic Studies. Her book *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (2006) won the Baron Prize for First Book in Jewish Studies.

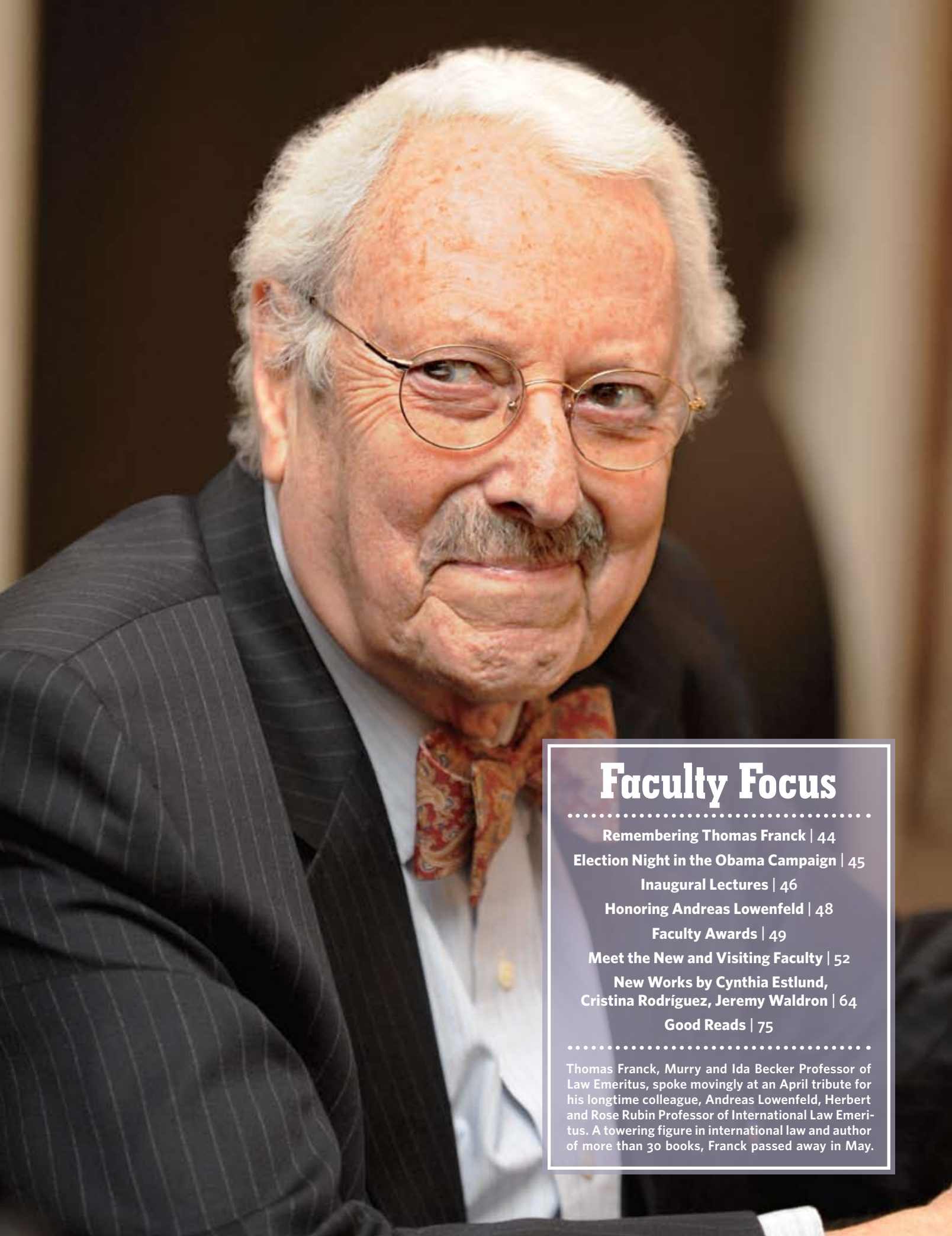
JAMES KUGEL is the director of the Institute for the History of the Jewish Bible and chairman of the Bible Department at Bar Ilan University. His numerous books include *The Bible As It Was* (1997), *The Ladder of Jacob* (2006), and *How to Read the Bible: A Guide to Scripture, Then and Now* (2007).



AVITAL MARGALIT is a professor of property law and the sociology of law at Bar Ilan University Faculty of Law. Her research focuses on law and reconciliation, the social and cultural aspects of property relationships, and the legal history of the kibbutz.

ADIEL SCHREMER is an associate professor in the department of Jewish history and director of the Halpern Center for the Study of Jewish Self-Perception at Bar-Ilan University. He is a fellow at the Shalom Hartman Institute in Jerusalem. Schremer is a recipient of the Urbach Prize from the Jewish Memorial Foundation and the World Union for Jewish Studies. His publications include *Male and Female He Created Them: Jewish Marriage in Late Second Temple, Mishnah and Talmud Periods* (2003), and *Brothers Estranged: Heresy, Christianity, and Jewish Identity in Late Antiquity* (2009).

AHARON SHEMESH is an associate professor in the department of Talmud, Bar-Ilan University. He has published widely on the development of Jewish law, including *Punishments and Sins* (2003) and *Halakhah in the Making: From Qumran to the Rabbis* (2009).



Faculty Focus

Thomas Franck, Murry and Ida Becker Professor of Law Emeritus, spoke movingly at an April tribute for his longtime colleague, Andreas Lowenfeld, Herbert and Rose Rubin Professor of International Law Emeritus. A towering figure in international law and author of more than 30 books, Franck passed away in May.

Thomas Franck, 1931-2009

Colleagues and his longtime assistant remember a beloved and distinguished professor on the faculty since 1960.

BEFORE I ENTERED THE LEGAL ACADemy, I knew Tom Franck only as the éminence grise of public international law. He was thoroughly intimidating, and not only because he wore bow ties. No one else managed to be editor in chief of the leading peer-reviewed journal in the field while still producing pathbreaking books at breakneck speed.

In 1991 I attended a summer workshop for young international law and international relations teachers. Tom's model of engaged advocacy for ordering the world on the basis of the rule of law so thoroughly captivated our interdisciplinary group that at our closing dance we improvised a new step, the "compliance pull," in tribute to Tom's response to why "powerful nations obey powerless rules" in what was then his latest book, *The Power of Legitimacy Among Nations*.

Over the years Tom became a friend, but he never ceased to intimidate me by virtue of his achievements. In addition to producing, on average, one book every 17.8 months for 43 years, Tom became the confidant of governments and secretaries general. He pushed the American Society of International Law to deepen its commitment to scholarship (eventually he became ASIL president), and he mentored hundreds of students, many of whom became leading lights in practice, government, or academe. Of course, Tom came into his own shortly after 9/11, when he courageously voiced support for law and multilateral cooperation when few, particularly in our government, were inclined to listen.

When I became president of ASIL, there was no doubt whose example I would seek to follow. I tried to emulate Tom's wit—as when he reimagined the society 100 years hence as a wholly owned subsidiary of the Chinese Society of International Law. I sought to make an esoteric, technical field accessible and to cross political and legal (and not just disciplinary) divides, as he did. To this day, his is the fellow émigré's voice I hear when I teach a class, comment on a colleague's work, give students advice, or try to make someone understand what the law means and why it matters.

We all need someone like Tom to make us do our best and to teach us how to face life's challenges with equanimity, courage, and poise. He died as he lived. In his last weeks he was engaged in planning for ▷

Professor Franck was more than my boss for 44 years; he was a part of my family and my friend. Working with him was a joy and a learning experience.

I fondly remember being invited with my husband to accompany Tom to the University of British Columbia when he received his LL.D. So that we could see the beautiful city of Vancouver, where he grew up, Tom borrowed a friend's car and spent two days showing us the sights. Sherwin and I also travelled to The Hague, where I spent two weeks working with Tom on his *Chad v. Libya* case before the International Court of Justice. The Hague is where Tom introduced us to Indonesian food. Wonderful memories!

Tom took tremendous pride in the achievements of his students. He was excited to hear when one was accepted to a clerkship, pursued an advanced degree, landed a prestigious job in government or a faculty appointment, or when one was honored with the Nobel Peace Prize. He felt the pride of a father. I admired most how Tom extended himself on behalf of his students.

I will surely miss Tom, but I will always have a smile on my face when thinking of him.

— Shelley Fenchel

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In one of his last publications, Tom writes of the beginning of his career as a research assistant to the legendary international law professor Louis Sohn. Tom was struck by the collection of giraffes that Sohn kept in his office and home to remind him that it was possible to keep one's head in the clouds while keeping one's feet firmly planted on the ground. I think that also describes Tom perfectly.

We were friends, to some extent rivals, and on most issues, we thought alike. Interestingly enough, we differed several times on issues of U.S. constitutional law. To take just one instance, at the time that the U.S. government wanted to get out of the Mutual Defense Treaty with the Republic of China (Taiwan), Tom and I were both asked to testify before the Senate Foreign Relations Committee on whether it was the president or the Senate that had the authority to terminate a treaty. Tom argued that since the Senate had given its advice and consent to making a treaty, it had to give its advice and consent to unmaking or withdrawing from it. I said the president makes treaties, and so the president must be able to unmake them. Government lawyers faced with such a question too often look first to the answer desired, then develop an argument to support it. For Tom it was not only possible but fundamentally ethical to address the question without regard to how one felt about Taiwan or the Defense Treaty.

Tom Franck will be best remembered for his seminal work at the frontier of law and philosophy—explorations of legitimacy, fairness, impartiality, proportionality, and the use and abuse of force. But like the giraffe in his mentor's study, he could plant his feet firmly on the ground as well.

— Andreas Lowenfeld, *Herbert and Rose Rubin Professor of International Law Emeritus*

INDELIBLE IMPRESSIONS Thomas M. Franck; **1** at the United Nations around 1981 with former student Mohamed ElBaradei (LL.M. '71, J.S.D. '74), far left, and Vladislav Tikhomirov, both of whom worked for Franck when he was the director of research for UNITAR. ElBaradei won the 2005 Nobel Peace Prize; **2** with Fenchel flanking the 2001–02 Junior Fellows of the Center for International Studies; **3** with Dorsen, his colleague of 48 years.

next semester's U.N. class, assisting yet another government before the World Court, and giving talks on his latest tour de force (an article that uses proportionality to examine everything from trade to human rights). Just days before he passed away, he dragged himself from his sickbed to join in a tribute to his retiring colleague Andreas Lowenfeld. In a gesture that typifies his irrepressible efforts to bridge academe and politics, he used that occasion to remind us, movingly, of the as yet unfulfilled dreams of those who seek to use law to achieve a more just world. Looking at Harold Koh, the Obama administration's nominee to be Secretary of State Clinton's top lawyer, he asked whether it was "too late" to achieve that world. Koh responded by saying that it was not. It was to be Tom's last message to those with power. □

—José Alvarez, *Herbert and Rose Rubin Professor of International Law*

Tom Franck's exceptional contributions to international law—as scholar, teacher, mentor, advocate, and judge—have been widely and justly recognized. Tom also deserves to be honored for his powerful influence on the NYU School of Law.

From the time I met him, soon after my appointment to the faculty, he was a key participant in the long process of transforming NYU from a good regional law school to the world-class institution it is today. He demanded quality in his own work, and he had high expectations for his colleagues. Thus, Tom was the obvious person to present the paper at the first faculty workshop, which younger members of the faculty instituted in the early 1960s. And, among many other activities, he served with distinction on the committee that formulated the plan for what became the Hauser Global Law School Program.

In short, Tom was for the Law School what in baseball is called an impact player—he brought luster to us all through intellect, character, and dedication. He cannot be replaced.

— Norman Dorsen, *Frederick I. and Grace A. Stokes Professor of Law*

An Inside View on History

During the primaries and the general election season, professors Samuel Issacharoff and Richard Pildes worked as part of the Obama campaign's legal team on voting and election issues. As a professor at the University of Chicago Law School, Obama taught from Issacharoff, Pildes, and Pamela Karlan's 1998 casebook, The Law of Democracy, *and had met with Pildes to discuss ideas during its creation. Issacharoff began his legal career by being part of a successful lawsuit that eventually led to the election of Mike Espy, the first African American congressman from Mississippi in the 20th century. After the historic 2008 election, the two wrote a letter to the Law School community on their experiences, excerpted below.*

Watching the inauguration in Tishman Auditorium

On election day and the days leading up to it, we were in the "boiler room" at campaign headquarters in Chicago, where we worked to monitor voting issues that arose around the country and to respond to any systemic problems that might require legal intervention or a response to legal intervention initiated by others.

One striking aspect of this experience was how well-organized the Obama campaign was. It would be hard to imagine a more sophisticated and well-run structure for oversight of these issues. Without giving away any secrets about exactly how this was done, we can say that we were aware of every potential problem at polling places throughout the battleground states. This awareness ranged from minor details, such as polling places that ran out of pens, to more significant ones, such as challenges to the eligibility of individual voters to vote. Some of these issues tested the commitment of citizens, as with the long lines in Virginia. Some had the quality of bizarre melodrama, as with the polling sites in Washington State that ran out of provisional ballots in English and tried to make do with the ones printed in Chinese. Through it all there was the captivating commitment to democratic values that filled even a room of tired and strained lawyers with admiration and respect.

The professionalism of the campaign's entire culture, from top to bottom, was also impressive. We were at the top of a pyramid of information coming in, much of it mediated by campaign workers, often in their 20s. It was obvious they had internalized the campaign's codes: no drama, stay in your own lanes, calm professionalism, and no leaks. Working within such a culture was a pleasure and made our work as smooth as possible—despite physical quarters that consisted of a small room with five thrown-together card tables for 15 people in a building with concrete floors that quickly covered our clothes with dust.

We are all fortunate there was no legal confrontation that rose to the level of the 2000 election. But there was a great deal of legal activity that mostly flew below the radar. There were cases brought by the political parties or outside groups on election day and the days right before in Ohio, Indiana, Virginia, New Hampshire, Pennsylvania, and New Jersey (the latter concerning election procedures in New Mexico). And of course, on election day we had to approach every potential issue as if the election's outcome could turn on it.

Being in Chicago's Grant Park on election night to witness Mr. Obama's victory address was the most moving experience of our professional lives. □

Law as an Economic Development Tool

Davis promotes the role of lawyers in his inaugural lecture as Beller Family Professor of Law.

In "Law, Lawyers, and Global Development: Can Lawyers Change the World?" Kevin Davis posed the question of whether lawyers can change the world by promoting economic development in poor countries. "I meant to specify 'for the better,'" he said. "This didn't occur to me until after the brochures went out." Referring to a letter to the editor published a few days before in the *Wall Street Journal* that read, in part, "America's disease is too many lawyers," Davis said, "It's clearly not self-evident that lawyers can change the world for the better."

Davis and Gary A. Beller '63 (LL.M. '71)

Davis refuted claims that lawyers serve mainly to redistribute wealth rather than create it, to the detriment of economic development, pointing to economic studies indicating that countries with solid legal institutions have better economic growth and economic outcomes.

Having addressed the question of whether law has the potential to effect change, he turned to another broad issue: how to determine the best way to implement change. Davis began by rejecting "the universalist approach that there's just one set of legal reforms that will make a difference" across a range of countries, voicing three main objections to that approach: It ignores the fact that different people have different values, and different legal systems might have different objectives; a viable substitute for a particular reform might already be in place; and the value of a given reform might hinge on complementary factors in a specific legal system.

Davis cited several examples related to his objections, such as a recent move in English-speaking Caribbean countries to abolish the court-of-highest-appeal status ▷

Defending Strauss

In his inaugural lecture as Lloyd C. Nelson Professor of International Law, Howse says the philosopher was no neocon.

In May 2003, a month after the U.S. had successfully toppled Saddam Hussein, it still could not produce proof of either key *casus belli* that had prompted it to do so: Saddam's weapons of mass destruction or his links to al Qaeda. That month Seymour Hersh wrote an influential *New Yorker* magazine article entitled "Selective Intelligence." It described a self-identified "cabal" of neoconservative policy wonks in the Bush administration, led by deputy defense secretary Paul Wolfowitz, who had played an important role in gathering and disseminating much of the prewar intelligence that was then proving to have been inaccurate. These strategists, who were said to believe that "deception is the norm in political life," identified themselves as disciples of the University of Chicago classicist and political philosopher Leo Strauss.

Thus it was that a humble German-Jewish academic who emigrated to the U.S. in 1938 and died in 1973 became tarred with responsibility for the blunders (or worse) of the Iraq war, and his professed followers became known as the "Leo-cons."

Lloyd Nelson's widow, Ann, and Howse

This public ignominy was profoundly hurtful to at least two people, both of whom were moved to write in Strauss's posthumous defense. One was Strauss's daughter, Jenny Strauss Clay, a philosophy professor at the University of Virginia; the other was Robert Howse, a politically left-leaning lawyer, philosopher, former diplomat, and leading expert on international trade regulation. In 2008, Howse joined the faculty of the NYU School of Law as the first holder of its newly endowed Lloyd C. Nelson Professorship in International Law. For the chair's October 2008 inaugural lecture, Howse delivered "Man of Peace: Rehearing the Case Against Leo Strauss."

The notion that Strauss espoused a might-makes-right, realpolitik approach to international affairs arose in part from an essay he wrote in *The City and Man* on Thucydides' account of the Peloponnesian War. Strauss taught primarily by commenting on other writers, often engaging in hypothetical dialogues with that author or even with characters from that author's work. As a result, interpreting precisely which strains of argument Strauss is endorsing is not always easy.

The predominant view of Thucydides at the time Strauss was writing, Howse says, was that Thucydides saw "international relations [as] a matter of power, and that ▷

of the London-based Privy Council, whose continuing jurisdiction is a throwback to British colonial days. Appeals would go instead to the islands' own national supreme courts or to the young Caribbean Court of Justice. Despite the pragmatism and the benefits of the status quo—Davis noted that the Privy Council is "one of the premier judicial institutions in the world," and its operating costs are covered by the U.K. government—Caribbean nations are expressing a different set of values, indicating the difficulty of imposing universalist legal reform. "It's about more than the economics," Davis said. "It's about nationalism, self-respect, and national pride—and those values matter, too."

Another example concerned the U.S. Agency for International Development, which managed to dramatically reduce the length of time needed to start a business in Afghanistan. But the agency found that in the aftermath of its intervention "all the delays, all the corruption" had shifted from the registration process to the licensing phase, severely limiting the positive impact of the reform. "So what are the practical implications of all this if we reject universalism?" Davis asked. He admitted that, in light of his claim that "the right answer in any given situation would depend on the context, depend on local conditions… most of us in this room have relatively little to offer, at least in our capacity as lawyers, to the poor countries of the world.… We don't know these different systems."

What lawyers can do, Davis said, is support local decision-making about legal reform by helping those who have access to crucial information and an understanding of local values. Outside lawyers can help ensure that local parties are acting in good faith, for instance, or share expertise on the effective drafting of legal agreements. "It's important to not forget the possibility of acting one case at a time, one client at a time on the litigation front, or just encouraging your own clients in the transactional setting to do some good and to take into account these broader interests," he said, adding, "I am skeptical of the claim that we can change the world at a stroke, just by drafting a set of laws and then having them adopted universally. But if the claim is that we can change things a little bit at a time, then I'm still relatively optimistic." □

justice and law had little if any effective meaningful role." According to Howse, however, this is neither a correct interpretation of Thucydides nor of Strauss. On the contrary, Howse argued in his lecture, "Strauss's essay deals extensively with international law: treaties, arbitration, customary law, sacral law.… International law and peace treaties [are depicted as having been] essential to the development of Greek civilization."

In the essay, Strauss also discusses the circumstances in which deceit and concealment may become necessary tactics for survival when a democratic society is defending itself against an evil aggressor. In all of his teachings, Howse says, Strauss insisted on facing the "hard dilemmas" that liberal societies face, but he did so with the goal of "understanding, strengthening, and protecting the just and liberal society." In contrast, he argues, neoconservatives were hijacking Strauss's teachings in an effort "to delegitimize" liberal society itself. For Howse, the key to Strauss's perspective can be found in his book *Natural Right and History,* where Strauss writes that "the objective discrimination between extreme actions which were just and extreme actions which were unjust is one of the noblest duties of the historian."

Having watched Germany's Weimar state collapse and be succeeded by Nazism, Strauss certainly understood that the "normal principles and constraints" of a liberal society "might need to be lessened [to defend itself] in extreme situations," Howse says. Nevertheless, Howse continues, "he did not favor removing those constraints." Strauss also recognized that distinguishing between the circumstances that justify such extraordinary deviations from the norm and those that don't cannot be accomplished by reliance on "hard and fast rules." In the end, Howse maintains that distinguishing between the two always remained crucial for Strauss, something he contends that the so-called Leo-cons either failed to understand or chose to disregard. □ *Roger Parloff*

Choi and Kahan: Favorite Authors

ONCE AGAIN, ARTICLES BY STEPHEN CHOI, Murray and Kathleen Bring Professor of Law, and Marcel Kahan, George T. Lowy Professor of Law, are among *Corporate Practice Commentator*'s top 10 corporate and securities articles of 2008, chosen in a poll of corporate law professors.


Choi


Kahan

From among 450 published pieces, the poll elicited praise for "The Market Penalty for Mutual Fund Scandals" by Choi and Kahan (*Boston University Law Review*); "On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance" by Choi and Jill Fisch (*Vanderbilt Law Review*); and "The Hanging Chads of Corporate Voting" by Kahan and Edward Rock (*Georgetown Law Journal*).

Over the 15-year history of the poll, Kahan has written or co-written more winning articles than any other author, with a total of 11. "In terms of what accounts for my articles getting recognition, one factor is that many are on topics that are of interest to other academics in the field, which makes it more likely that people read them," he said. Running a close second, Choi has a total of nine top-10 finishes. Other NYU Law professors have also been recognized for their scholarship, including William Allen, Nusbaum Professor of Law and Business; Jennifer Arlen, Norma Z. Paige Professor of Law; and Geoffrey Miller, Stuyvesant P. Comfort Professor of Law. □

In Memory of Michael Schwind

Professor of Law Emeritus Michael Schwind passed away on September 15, 2008 at age 85. An expert in the field of comparative civil law, Schwind was born in Austria and grew up in Ecuador, where he earned a law degree in Quito before moving to New York. Here, he earned an LL.M. in 1953 and an additional bachelor of laws in 1957, both from the NYU School of Law. Schwind joined the faculty in 1964, quickly establishing himself as a devoted teacher; he retired in 1994. He taught courses in comparative civil law, conflicts of law, and Roman law. He also served as a member of the board of directors and officer at the American Foreign Law Association. Schwind's close friend and Law School colleague Milton Schwartz said, "He was beloved by his students and appreciated as well by his faculty colleagues for his knowledge, insights, humanity, and wit."

A Tribute to Lowenfeld

CHRISTOPHER BORGEN '95, A FORMER student of Herbert and Rose Rubin Professor of International Law Emeritus Andreas Lowenfeld, shall always remember the Alamo.

In 1999, mentor and student were reunited at a judicial conference in San Antonio. They set off together to visit the former Spanish mission where Davy Crockett and his comrades were killed in 1836 during the most famous battle of the Texas War of Independence from Mexico. "Andy had us poring over historical documents, such as treaties and land deeds," rather than the popular exhibits reenacting the battle, said Borgen. Now a professor at St. John's University School of Law, Borgen said his visit to a tourist trap was enriched by the historical investigations and became a valuable lesson: A good educator sees what others do not.

Borgen is hardly alone in testifying to the benefits of knowing Lowenfeld, who attains emeritus status this fall after 42 years on the faculty. Lowenfeld was given a special tribute in April at a three-day symposium organized by his colleague Linda Silberman, Martin Lipton Professor of Law, that focused on key areas of his scholarly impact: public international law, trade and economic law, private international law, and international arbitration.

Lowenfeld's academic service as a world-renowned scholar and a much-beloved teacher followed a lively career that began in the 1960s as a lawyer at the U.S. Department of State under presidents John F. Kennedy and Lyndon Johnson. Lowenfeld provided strategic counsel to those presidents during the Cuban Missile Crisis; the Nuclear Test Ban Treaty; the so-called "Chicken War," in which the U.S. and the European Common Market sparred over poultry tariffs; and the U.S. invasion of the Dominican Republic. As a prolific scholar—Lowenfeld's "selected" writings, according to a program distributed at the tribute event, number 14 books and 43 law review articles—he has lectured practically everywhere, notably at the Hague Academy in 1979 with a series of talks he called the "Public Law Tabu," in which he proposed criteria for a global community largely free of strict legal rules and based instead upon what he termed "reasonableness, not certainty."

Professional accomplishment, however, "doesn't begin to tell you about Andy the man—the people he's influenced, the scholars he's mentored, the people he has enriched," said Silberman as she introduced Lowenfeld. Thomas Franck and Harold Koh, among many others, added their own praises.

Franck, Murry and Ida Becker Professor of Law Emeritus, who passed away in May, said Lowenfeld's work has rendered "sense and order to the world of conceptual confusion that has always marked great convulsions in the ordering of civilizations: the sort of thing that follows the dying of the light, the dusk of rationality. He was able to bring that clarity of his thinking to a real trifecta: to the Law School, to the U.S. courts, and even to the world of private commercial transactions—a whole new field aborning."

Koh, dean of Yale Law School, took time out from preparing for confirmation hearings in Washington, D.C., on his nomination to become legal adviser to the State Department, to stop by and say of his mentor, "He taught me how to be a teacher, and a champion of reasonableness. And finally, how to be a problem solver—how to speak across ideological lines in this very troubled world."

Michael Mattler '95, minority chief counsel to the U.S. Senate Committee on Foreign Relations, sent a letter to be read aloud: "What I remember and love most is Professor Lowenfeld's infectious enthusiasm for his subject, and his students.... The international litigation seminar [Silberman and Lowenfeld] taught was among the best courses I took while in law school, and helped me on a professional course that has included work on litigation before U.S. courts under the Foreign Sovereign Immunities Act and before international tribunals including the International Court of Justice, the Iran-U.S. Claims Tribunal, and the United Nations Compensation Commission." In a later interview, he added, "One can never fully repay what one gets from mentors such as Andy Lowenfeld. All we can do, those of us who were his students, is go out into the world and put the lessons we've learned to good use." □ *Thomas Adcock*







THE TIES THAT BIND **1** Lowenfeld, who has been a distinguished member of the faculty since 1967; **2** with Lee Marks, senior counsel of Greenberg Traurig; **3** Lowenfeld's son, Julian '90; **4** Harold Koh; **5** with tribute organizer Linda Silberman; **6** NYU President John Sexton; **7** the late Thomas Franck with Dean Richard Revesz; **8** longtime colleague Norman Dorsen.

Making a Law Class of a Fine-Feathered Story

PROFESSOR OF LAW KATRINA WYMAN picked up the *New York Times Sunday Book Review* in February of last year without any particular academic intentions. The cover story that week was a review of Bruce Barcott's *The Last Flight of the Scarlet Macaw*, the nonfiction account of an American expatriate's unsuccessful attempt to prevent construction of a dam in Belize that would wipe out the habitat of the endangered scarlet macaw. "After I read the book," Wyman recalled, "I realized that it raises a lot of interesting legal questions." Enough legal questions, it proved, to become the focus of her semester-long Practice of Public Interest Environmental Law course.

This class—designed for a group of student fellows who had spent the previous summer doing environmental law work for NGOs or government agencies—had been taught at the Law School for several years, but Wyman decided to give it a complete structural overhaul for Fall 2008. She contacted experts, most of them directly involved in the story documented in *Scarlet Macaw*, to see if they'd be willing to lecture to the class. "They were quite interested in coming to talk about their involvement," Wyman said. She even managed to secure the participation of the author. Barcott talked with Wyman and her students via a conference call from Seattle. Nearly every class meeting was augmented with a guest lecturer, including representatives from the Inter-American Development Bank, the Natural Resources Defense Council, and the Conservation Strategy Fund, all of whom had a direct role in aiding or ending the dam construction at the heart of the book. Dr. Joel Cohen—a Rockefeller University professor who was not directly involved in the case but offered his expertise in population biology to the class—lauded his experience with the class, referring to the students as "wonderful." "They were very engaged," he said, "and asked smart, informed questions."

Students, too, appreciated the experience. "I thought it actually worked very well," said Maron Greenleaf '10. Rather than focus on one theoretical topic, students were instead invited to see this one particular case from many different angles and to place their legal knowledge in a real-world context. "Using the one book provided a lot of coherence," said Greenleaf. Wyman plans to repeat the class in the future—but with different books. She is, after all, inclined to innovation. □

Anatomy of a Financial Meltdown

A SCHOLAR OF FINANCIAL INSTITUTIONS, Geoffrey Miller, Stuyvesant Comfort Professor of Law and director of the Center for the Study of Central Banks and Financial Institutions, naturally wanted to investigate the origins of the current global economic recession. Miller thought law students might share his interest, so he created The Crisis of 2008 seminar. "Registration closed in about 20 minutes," Miller said. "There is a tremendous demand for knowledge about how this crisis happened."

Miller came to the conclusion that the crisis was foreseeable. He likens the current global recession to the *Challenger* disaster of 1986, in which the space shuttle exploded shortly after takeoff due to faulty seals on the booster engines. "The design flaw made what happened inevitable, but no one saw it at the time," he said. "In this case, the challenge for law- and policy-makers who did not predict what would inevitably happen is how to take effective action to deal with the disaster and prevent further economic disasters in the future."

In response to the overwhelming interest in the course, Miller made the unusual but welcome decision to open up the first three sessions to the Law School community. These three-hour classes in January each focused on a particular aspect of the crisis. The first class examined prior financial crises to gain historical background and appreciation for the scope of the disaster. The second, co-taught with Gerald Rosenfeld, co-director of the Mitchell Jacobson Leadership Program in Law and Business, looked at the "subprime mortgage mess" of 2007: how it happened, what could have prevented it, and its consequences on the global economy. The third class, also with Rosenfeld, looked into the credit crunch of 2008 and the "dramatic events that followed," including the near-failure of Bear Stearns, the bankruptcy of Lehman Brothers, and the scramble for survival among large multinational companies like Citicorp, AIG, and General Motors.

After the first three open classes, the course became a seminar for the 28 registered students, who delved deeper into the course materials and conducted research and wrote papers on such topics as housing finance, banks, credit markets, insurance and securities, the effect of the crisis on Main Street, and the international dimensions of the crisis.

Miller said one of the biggest challenges in creating this course was compiling materials on what he called "a moving target." Relying heavily on news accounts and government statistics, "I had to make it up out of whole cloth," he said. The classes made extensive use of multimedia materials, including news items in audio and visual formats and hundreds of PowerPoint slides created by Miller. But the effort was worth it: "This is the most significant economic downturn since the Great Depression," Miller said. "Fundamental damage has been done to the credit and securities markets. We face a very long recovery from the big bubble bursting. It is not going to be fast. We are all going to be living with this for a long time." □

MACAW: MARTIN HARVEY / PHOTOGRAPHER'S CHOICE / PUNCHSTOCK

Laurels and Accolades

For their dedication, body of work, or influence, NYU School of Law faculty are acclaimed by their peers and students.

FORUM FOR ADLER'S WORK

Professor Amy Adler's scholarship on child pornography law was the subject of an April interdisciplinary forum, "Spectacles of Childhood: Law, Child Pornography, and Sex Panic," co-sponsored by the Center for the Study of Gender and Sexuality, the NYU Postdoctoral Program in Psychotherapy and Psychoanalysis, the Psychoanalytic Psychotherapy Study Center, and *Studies in Gender and Sexuality*.

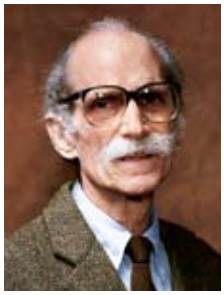
The centerpiece of the forum was a talk given by Adler in which she explored the possibility that the expansion of child pornography law may unwittingly reinforce the very problem it fights: the sexualization of children in our culture.

After tracing the evolution of child pornography law, Adler deconstructed the troubling significance of a recurring, pseudo-law enforcement, *Dateline NBC* project, "To Catch a Predator," in which correspondent Chris Hansen confronts would-be "online predators," who have engaged in sexually explicit chats with a decoy who has pretended to be a minor. Hansen reads the explicit exchanges aloud on camera "until the predator literally begs for mercy," Adler said. "The show continually restages the spectacle of the sexual child that it seeks to condemn.... Now the pedophile's fantasy is mainstream entertainment, packaged for sweeps week."

TWO AWARDS FOR AMSTERDAM

University Professor Anthony Amsterdam received the Yves Pélicier Award, for his vital contributions to the field of law and mental health, from the International Academy of Law and Mental Health on June 28. The IALMH draws from law, the health professions, the social sciences, and the humanities to address issues at the intersection of law and mental health. "Professor Anthony Amsterdam has achieved international acclaim for his persistent efforts in utilizing constitutional law to protect the rights of incarcerated persons," said David Weisstub, honorary lifetime president of IALMH. "As a professor of law, he has been responsible for landmark initiatives in developing methods for the humanistic training of lawyers. The IALMH committee is of the view that Professor Amsterdam is the primary world figure in the pursuit of justice in cases involving capital punishment."

Amsterdam, who currently teaches the Capital Defender Clinic and famously won *Furman v. Georgia*, the 1972 Supreme Court case that for four years ended capital punishment in the United States, also won the 2008 Frederick Douglass Human Rights Award from the Southern Center for Human Rights. The award, given to individuals who have shown "brilliance and tenacity in the defense of human rights," was presented to Amsterdam last October. Lisa Kung '97, SCHR's director, called Amsterdam "the most brilliant legal mind in the modern fight against capital punishment."



DAVIS, A POWERFUL EDUCATOR

National Jurist has named Peggy Cooper Davis, John S.R. Shad Professor of Lawyering and Ethics and the director of the Lawyering Program, one of the three most influential people in legal education, defined as "people who have influenced legal education in a way that continues to benefit current and future law students."

Under Davis's leadership, the Lawyering Program provides first-year students the opportunity to execute a legal strategy by drafting documents, interviewing witnesses and clients, and engaging in negotiation, mediation, and litigation. "We need to spend more time developing the many kinds of skills and intelligences for necessary practice," Davis told the magazine. "And I'm of the belief that professional education has to become multidisciplinary and multifaceted to keep up."

UNANIMOUS SELECTION OF 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 reported that the journal's executive board was unanimous in its selection, and he said that Estlund is "recognized by every author who publishes with us. Her body of scholarship is extensive and 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 when we were creating our symposium this year." The award honors the memory of Kaynard '42, a major figure in labor and employment law who worked to increase recognition of the field.

FOX HONORED TWICE

On June 18, Eleanor Fox '61, Walter J. Derenberg Professor of Trade Regulation, was presented with the 10th annual Antitrust Achievement Award by the American Antitrust Institute, an independent, nonprofit think tank advocating the increased role of competition. AAI President Albert Foer called Fox "one of the most important figures in the field of international antitrust." Fox served as a committee and commission member on antitrust and international competition matters during the Carter and Clinton administrations; has advised the European Union and countries as far-flung as Indonesia, Russia, and South Africa; and was the first female vice chair of the American Bar Association's Antitrust Section.

Another feather was added to her cap last March, when Fox received an honorary doctorate from the University of Paris–Dauphine. Fox was honored for her work on issues of global governance and competition law. After the degree was conferred, she delivered a lecture, "Global Legal Norms and Efficiency and Justice in the World: The Soft Underbelly of Global Convergence."

SATTERTHWAITE AT THE FORE

The Women's Association of Law at Pace Law School named Margaret Satterthwaite '99 its 2009 Pioneer of Justice and Equality for Women and the Law. Associate professor of clinical law and faculty director of the Center for Human Rights and Global Justice, as well as faculty director of the Root-Tilden-Kern Program, Satterthwaite was honored for helping to "bring women closer to equality in society and the law." She joins the company of previous winners Catherine MacKinnon of the University of Michigan Law School and Congresswoman Nita Lowey. At the ceremony Satterthwaite, whose work has taken her to Nigeria, Northern Ireland, and Yemen, spoke about her experiences as the only woman on a team of human rights investigators at the Haitian National Truth Commission. "There's no single path to social change," Satterthwaite told the audience. "Each of us must choose our own path and embrace our gifts as a part of the larger struggle."

WEILER ON CHURCH AND STATE

In January, Joseph Weiler, University Professor and Joseph Straus Professor of Law, gave a presentation at a forum called "The American Model of Church-State Relations." The international conference was held in honor of the 25th anniversary of formal diplomatic relations between the United States and the Vatican. Invited by Mary Ann Glendon, then-U.S. Ambassador to the Holy See, Weiler joined other distinguished constitutional law experts at the American Academy in Rome for a roundtable discussion comparing church-state relations in much of Europe and the United States. Weiler spoke about the perdurable connection between cultural identity and religious history; where the U.S. strives for a secular approach, European countries have done less to separate religion from law and culture: "The Irish without the Holy Trinity and the British without 'God Save the Queen' lose a crucial part of what defines them as a nation."

THREE WIN TEACHING AWARDS

Stephen Choi, Murray and Kathleen Bring Professor of Law, Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, and Nancy Morawetz '81, professor of clinical law, were honored with the Albert Podell Distinguished Teaching Awards at the Law School's end-of-year-dinner. Established in 2007 by Podell '76, the awards recognize the outstanding achievements of faculty in the classroom.

The students who nominated their instructors for the honor were effusive. Thomas Fritzsche '09 said that Morawetz, who leads the Immigrant Rights Clinic, is "always attuned to the strategic concerns that are relevant to the work done in her clinic.... She manages to simultaneously lend her students her wisdom and support while allowing us to work through difficult questions on our own."

Calling Issacharoff "the consummate 1L law professor," Nishanth Chari '10 said that he "found a way to make Civil Procedure... not only interesting but fun. He had a very subtle way of presenting what seemed to be a straightforward issue and peeling back layers to reveal the complexity." Citing Issacharoff's real-world experience, Chari added that "his anecdotes from his work on the famous asbestos class action cases gave us deeper insights than a textbook ever could."

"Professor Choi is able to take securities regulation...and make it come alive," said Julie Chen '09. "His mastery of the securities area of law is evident, but his ability to explain a byzantine code with humor, ease, and the greatest clarity puts him in a class of his own. His pedagogical approach demonstrates that he values the uniqueness of each student. Choi is not only brilliant, he's an incredible teacher and a wonderful human being." □

Amato and Dorsen

Hauser Program Honors Its Founding Director

At its annual dinner last February, the Hauser Global Law School Program honored its first director, Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law. Dean Richard Revesz, Hauser Foundation President Rita Hauser, and current Hauser Chair and Faculty Director Richard Stewart all gave remarks praising Dorsen's achievements for the Hauser program, including his work as founding editorial director of *I•CON*, NYU's journal of international constitutional law.

From 1976 to 1991, Dorsen served as president of the American Civil Liberties Union. In recognition of this work, President Bill Clinton awarded him the Eleanor Roosevelt Human Rights Award in 2000 for "using the power of law to uphold civil rights at home and human dignity around the world." Dorsen also sits on the Council on Foreign Relations and is a fellow of the American Academy of Arts and Sciences.

The night's featured speaker, Hauser Distinguished Global Visitor and former prime minister of Italy Giuliano Amato, discussed the continuing spread of constitutionalism in an increasingly globalized world. He commended Dorsen for his efforts to this end: "Norman has been one of the most generous and effective promoters of [constitutionalism]," Amato said, "and this, Norman, is why you have our admiration and our gratitude." To conclude the evening, Dorsen himself gave a short and endearingly modest address thanking his family, mentors, and those who helped to build the Hauser program. He shared his delight at being able to "bask in the opportunity to be here at the NYU School of Law."

Meron on International Criminal Justice

JUDGE THEODOR MERON OF THE INTERnational Criminal Tribunal for the Former Yugoslavia (ICTY) made a case for the importance of his domain in his February lecture, "International Criminal Justice: Does It Work?" sponsored by the Institute for International Law and Justice.

Meron, Charles L. Denison Professor of Law Emeritus and Judicial Fellow, observed that as recently as 20 years ago, international criminal courts were virtually nonexistent. But in the early 1990s a series of horrific acts, particularly ethnic cleansing in the former Yugoslavia, brought the need for international criminal proceedings to the fore, and the ICTY was established. The International Criminal Tribunal for Rwanda followed soon after, and the Special Court for Sierra Leone and the International Criminal Court (ICC) were formed in the ensuing decade.

These new international criminal courts have faced daunting obstacles, Meron said. Despite successful prosecutions, international judicial bodies are in a delicate position. "The tribunals are entirely dependent on the good will of nation-states," Meron said, adding, "Recent successes cannot hide the fact that the tribunals remain extraordinarily dependent on actors outside their control to execute warrants, save for the few individuals who turn themselves in voluntarily." Another problem is lack of participation in these institutions; 70 percent of the world's population does not live in an ICC member state.

Despite these challenges, he said, international criminal tribunals have done much to define how international criminal justice looks in practice. "There is a world of difference between the rudimentary due-process norms of Nuremberg and the meticulous attention to due process in the tribunals.... It took the development of rules of procedure and evidence and the vital judicial gloss provided by the jurisprudence of the tribunals to create a credible, viable body of international criminal law capable of being applied by courts of law."

The international criminal courts cannot do the judicial work alone, Meron said: "The tribunals, despite their precedent-setting importance, will never have sufficient material and political support to prosecute more than just a few of the many international crimes that take place. National courts will have to carry the burden of trying most international crimes." Of the U.S. in particular, Meron was optimistic about its potential to prosecute international crimes, citing Barack Obama's disavowal of torture and the decision to close Guantánamo. Even before the new administration took power, Meron said, the U.S. had been "doing a reasonable job of prosecuting rank-and-file members of its military who commit international crimes, though not in prosecuting higher-ranking individuals.... I believe this record will improve."

If the world has not reached the end of the path to justice, Meron concluded, at least it is on the right track: "In record time, international criminal justice has emerged as a key advancement in the long fight to end impunity, enforce accountability, and establish international rule of law. This is an achievement that humanity can be proud of." □

New Faculty

José Alvarez

HERBERT AND ROSE RUBIN PROFESSOR OF INTERNATIONAL LAW

International law scholar José Alvarez is known to ruffle feathers. Giving a keynote speech that became "Torturing the Law" in the *Case Western Reserve Journal of International Law* (2006), he was one of the first academics to suggest that the Bush administration probably violated the lawyers' code of professional responsibility post-9/11. Delivering his lecture "The Schizophrenias of R2P" at The Hague in 2007, he questioned whether the sacred cow of many NGOs—the so-called "responsibility to protect" principle—could be misused to violate the rights of states and their peoples.

Yet he still took his colleagues by surprise when, while giving an address as president of the American Society of International Law in March 2007, he handed out a pamphlet called "International Law: 50 Ways It Harms Our Lives," complete with items like No. 36: Failing to Prevent Genocide. "A number of people were affronted. A number of people loved it. But nobody forgot it," recalls Lucy Reed, current president of ASIL.

Sitting at his kitchen table in Westchester, laughing heartily at his antic—the booklet was a parody of a more earnest one done by an ASIL committee the year before—Alvarez says: "International lawyers tend to be very certain of their moral virtue. We need to avoid hubris. It's important to be aware of the pitfalls, the way international law can empower the powerful."

Alvarez, 54, who writes extensively about public international law and foreign investment law, is moving downtown from Columbia Law School, where he was director of the Center on Global Legal Problems. He's a member of the Council on Foreign Relations and was an attorney adviser at the U.S. Department of State, where he assisted on arbitrations before the Iran-U.S. Claims Tribunal. "He cares about the difference international law makes for ordinary people," says Mark Drumbl of Washington and Lee University School of Law. "He's an extremely courageous scholar, a principled thinker who has inspired the younger generation"—including Drumbl, who is 40.

Alvarez insists that his goal is more than "just bomb-throwing." As a Cuban immigrant, he says, "a certain part of me wants to welcome the outsider." As ASIL president, he translated his newsletter columns into Spanish, and reached out to counterpart societies around the world. He takes pains to ensure that international law is accessible to all. He and Reed, for example, boiled down the basics of their field to a primer that Alvarez has used to introduce the field to practicing lawyers and even inmates at a New York maximum security prison.

In his best-known work, *International Organizations as Law-makers* (2005), Alvarez examines the growing role of international organizations in influencing state and individual behavior. The book analyzes organizations as disparate as the International Postal Union and the U.N. Security Council and is acclaimed for combining insight of the organizations' day-to-day practice with theory and a dose of criticism. "This book is a treasure trove that shows how the law matters to people in politics, and how politics impinge upon the text that lawyers dream up," says Thomas Weiss, director of the Ralph Bunche Institute for International Studies at the CUNY Graduate Center. "Alvarez moves effortlessly between politics and the law."

Alvarez is working on a book tentatively titled *The Once and Future Foreign Investment Regime*, which stems from a series of lectures he gave this past summer at The Hague Academy of International Law. The book will explore the nearly 3,000 bilateral and regional investment treaties that govern the rights of foreign investors and that, Alvarez argues, help drive economic globalization. "There's a perception that the international investment regime is tilted in favor of rich, capital-exporting states and their investors," he says. He will explore whether the regime needs significant reform.

In Cuba, Alvarez's parents, José, now 94, and Maria, now deceased, worked side-by-side at a popular tamale stand in their tiny town of Punta Brava. After fleeing Castro in 1961 with a hundred-dollar bill tucked into the elder José's shoe and another $100 sewn into Maria's purse strap, the family moved to the Bronx in 1962, and then Miami in 1966. As a preteen in Florida, Alvarez embarked on a lifelong mission to "catch up" to his peers: "I was driven to succeed." He wrote for the high school newspaper, winning a prestigious journalism award. He took the few A.P. courses offered in his public school and entered Harvard in 1973. "I was this straight-laced Cuban kid" living in a co-ed residential house with upperclassmen. "Pot was flowing through the corridors; everyone was having sex, and their politics were to the left of Che Guevara," he jokes.

Graduating in 1977 with a major in social studies, he won a Rotary Scholarship to Oxford, where he earned a second B.A. in jurisprudence. Returning to the U.S., he received his J.D. from Harvard Law School in 1981 and practiced law at a D.C. firm and at the State Department. He joined the faculties of law at George Washington University and the University of Michigan before heading to Columbia in 1999.

As a visiting professor in 2008-09, he was drawn to the depth of NYU's international law

faculty and the preponderance of activities. "At NYU, I can walk in, turn on the lights, and everything is there," he says. When his son Gabriel finishes high school next year, Alvarez and his wife, Susan, an appellate litigator, plan to move into the city to feed their passion for theater and film—particularly black comedies: "I'm inspired by people who force us to look at the world a bit askew."

Barton Beebe

PROFESSOR OF LAW

Nix the bookshelves; pump up the tech budget. That's what Barton Beebe requested for his new Vanderbilt Hall office. All that Beebe really needs to feel at home are two 30-inch monitors and a computer powerful enough to handle his high-tech needs. "I do everything as paperless as possible," says Beebe, who plans to bring just one box of files when he leaves Benjamin N. Cardozo School of Law to join the NYU School of Law in September. A trademark, copyright, and intellectual property law scholar, he's convinced that technology has taken society to the point where the intangible is more valuable than the tangible: "I have my library in a hard drive rather than in some giant wall of books."

Ninety percent of everything he's read since he started teaching is ensconced on his Tablet PC—a laptop with an interactive touch screen. "It's a lot easier than remembering where I filed a sheet of paper," he says. He uses two external hard drives, one off-site backup server, and a desktop computer fueling two hard drives that are mirror copies of each other. His system automatically backs up his work every three to four hours, creating four to five copies. "If you go paperless, you've got to have that mentality," he says.

Beebe, 39, named Cardozo's Best Professor in 2007, is beloved by his students, who see him as an eccentrically humorous intellectual with a well-coiffed plume of hair—"a theorist in a sea of practitioners," says Cardozo alumnus Jacob Wentworth, who took three of Beebe's courses. "He's really interested in what he's doing, and can really geek out about it," adds Erin Simon '09, who took his Intellectual Property and Globalization seminar last fall when Beebe was a visiting professor.

Beebe doesn't like to cold-call on students, yet "he gets people to participate without putting them on the spot," says Matthew Turk '10. "It's not easy to get the right dynamic in a 20-person seminar," Turk adds, "but he struck the right balance between encouraging discussion and presenting information."

Beebe's work is known for its versatility. "Barton's scholarship shows extraordinary range, from high theory to detailed empirical work that challenges some well-settled assumptions, particularly regarding fair use," says intellectual property professor Jane Ginsburg of Columbia Law School. In "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005" (*Pennsylvania Law Review,* 2008), for example, he delved beyond headline cases, reading 306 opinions three times each to determine which factors actually drove judicial outcomes. "Coding the opinions took forever," Beebe says. But colleagues say the results were worth the effort. "It's the most refreshing and informative fair use article I've ever read," says Pamela Samuelson of the University of California, Berkeley, School of Law. The conventional wisdom is that the commercial nature of a reputed fair user would undermine a fair use defense, she explains. "Beebe shows that isn't so."

In a completely different vein, Beebe's forthcoming article "Intellectual Property Law and the Sumptuary Code" (*Harvard Law Review*, 2010) explores the use of intellectual property law to suppress the social and cultural implications of copying technology. Much of our consumer culture is based on the consumption of rarities such as diamonds, he says. But copying technology is becoming increasingly quick and cheap. "We can no longer rely on nature to enforce the conditions of rarity," he explains, "so we've got to enforce those conditions ourselves, and we're doing so through intellectual property law."

Growing up, Beebe and his sister, Brooke, moved frequently to wherever their architect dad, Red, was needed to build a city's transit system. Their mom, Nancy, now deceased, was a public school special education teacher. Beebe spent his middle school years in Houston, where football was the rage, and hated every minute of it. "When everyone was cheering for the football team and I couldn't care less, I felt a real sense of estrangement," says Beebe, who was a debater. "It wasn't my world."

The family moved to Oakland, California, during Beebe's first year of high school, and life turned around. He fell in love with the city's natural beauty and the intellectual atmosphere of his small private school. Despite taking some ribbing about his Lone Star twang, Beebe thrived, since debate was as cool there as football had been in Texas.

Beebe then went to the University of Chicago, soaking in the intellectual rigor of the school's core curriculum, which focuses on the so-called "great books" of the Western canon. Graduating in 1992 with a B.A. in literature, he won a German scholarship, followed by a Whiting Fellowship in the Humanities while doing graduate work at Princeton University.

In 1998, he earned his Ph.D. in literature, but had become dismayed by the impact literary theory was having on the academy: "There was a lot of sophistry and theoretical jargon." By comparison, he says, "law seemed so much more worldly, and I was attracted to the rigorous, pragmatic nature of legal thinking." His debating skills made for a smooth transition to Yale Law School, and his literary studies naturally led him to copyright law. He earned his J.D. in 2001, and started teaching at Cardozo after a federal clerkship and a stint at Debevoise & Plimpton.

When Beebe visited the Law School, he liked what he saw. "It's like a cruise ship," bustling with activities, he says. "There's something on Lido Deck 3 and something else in the Venetian Room on 4. You just can't keep up."

Beebe is married to Amrit Singh, an ACLU attorney. They live uptown with their rescue dog, Biba, bicycle together in Central Park, and travel twice a year to India—Tablet PC in hand. Says Beebe: "I can work in Central Park, along the Hudson, or in a garden in Delhi."

Richard Epstein

VISITING PROFESSOR OF LAW

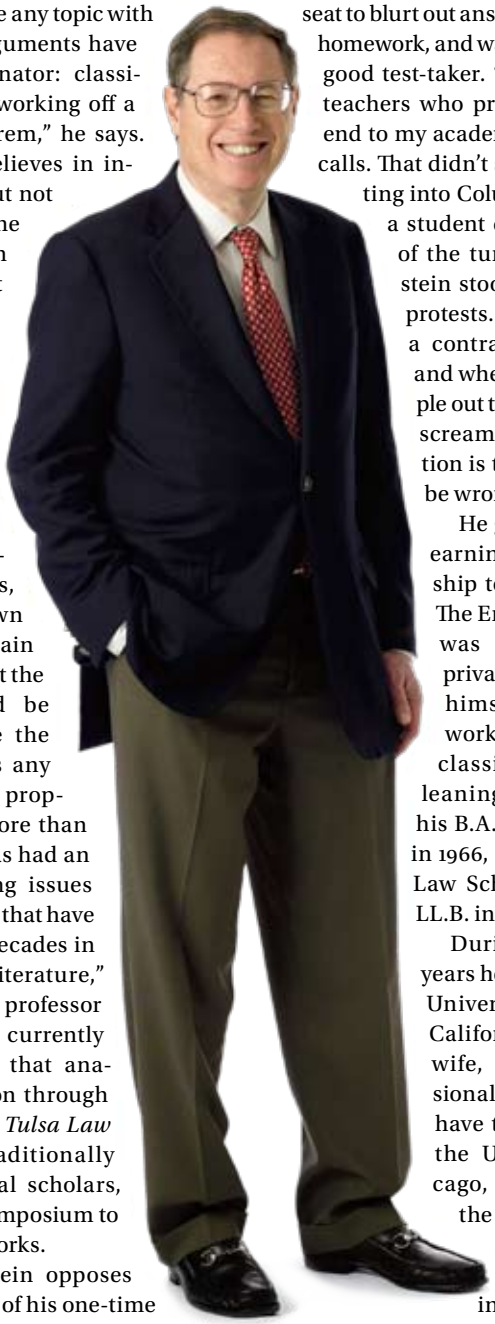
A classical libertarian arguing against universal health care, Richard Epstein was clearly at a disadvantage when he took the podium in April 2008 to debate Americans' right to health care. He was in Massachusetts, the only state that requires health coverage, and participating in a forum sponsored by PBS. He faced Judy-Ann Bigby, an advocate of the state's near-universal coverage plan and the secretary of health. "It was the worst possible setting for him," says one of his opponents, Regina Herzlinger of Harvard Business School.

Rarely coy, Epstein began by declaring that Wal-Mart could provide health coverage better than Massachusetts could. Then in a move Herzlinger called "Kissinger-esque," Epstein distanced himself from his teammate, who was presenting a distasteful argument, and reached across the aisle to her. "It took him about five minutes to realign three of the four debaters," she says. Afterward, Epstein was "surrounded by people who may not have liked what he had to say but were dazzled by his brilliance."

Epstein's debating skills are legendary, as is almost everything about the man. It's been said that taking notes in his class is like trying to fill a Dixie cup with water from Niagara Falls. "Richard speaks without breathing, and in perfect paragraphs," says Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law. During the timed closing remarks in Boston, Epstein got in 35 percent more words than did his opponent (218 words per minute versus 161).

It seems he knows something about everything, and his reach extends beyond the academy to newspaper op-eds, podcasts, and even YouTube videos. He's written and edited 22 books on diverse subjects. At the University of Chicago, he has taught 27 different courses—including Roman law—since 1972. Epstein, who has been an annual visiting professor at the NYU School of Law since 2005, plans to follow suit when he permanently joins the faculty in 2010. "Whatever they ask is what I teach," Epstein says. "That's always been my rule."

He trains students to speak off-the-cuff—a practice that can fell even the ablest. He calls on a student closest to the aisle, then moves rapidly down the row, getting through half the class in an hour. "He's intimidating at first, but he's not trying to embarrass you," says Michael Schachter '10, who nearly blacked out once when Epstein worked his way toward him in Contracts.



Epstein can debate any topic with ease because his arguments have a common denominator: classical liberalism. "I'm working off a strong, central theorem," he says. In a nutshell: He believes in individual freedom, but not unconstrained by the rights of others, and in limited government with an eye toward the common good.

In his best-known work, *Takings: Private Property and the Power of Eminent Domain* (1985), which has been cited in four U.S. Supreme Court cases, he doesn't come down against eminent domain per se, but argues that the government should be required to provide the same protections as any private entity in a property dispute. "He, more than any other scholar, has had an impact on reopening issues about property rights that have been neglected for decades in the constitutional literature," says Vanderbilt law professor James Ely. Epstein is currently working on a book that analyzes the Constitution through libertarian eyes. The *Tulsa Law Review*, which traditionally honors constitutional scholars, dedicated its 2008 symposium to Epstein's complete works.

Predictably, Epstein opposes most of the positions of his one-time colleague President Barack Obama. He does support the president's call to safeguard habeas corpus rights and close Guantánamo Bay, while reserving his highest compliment for Obama's skill in another arena altogether: the basketball court. "He's a great player, but not the equal of Arne Duncan, his education secretary," says Epstein, who played with those two plus First Brother-in-Law Craig Robinson at a party for Marty Nesbitt, Obama's campaign treasurer.

Epstein was raised with his two sisters in what he calls "a perfectly conventional Brooklyn home." His father, Bernard, was a radiologist, and his mother, Catherine, "a basic New Deal liberal," ran Bernard's office. Epstein did well in school, but was not a model student. He bounced out of his seat to blurt out answers, often lost his homework, and wasn't a particularly good test-taker. "I had a bunch of teachers who prophesied an ugly end to my academic career," he recalls. That didn't stop him from getting into Columbia College. As a student during the height of the turbulent 1960s, Epstein stood apart from the protests. "I've always been a contrarian intellectual, and when I see lots of people out there chanting and screaming, my first reaction is that they've got to be wrong," he says.

He graduated in 1964, earning a Kellett Fellowship to study at Oxford. The English curriculum was oriented toward private law, so he found himself immersed in work by judges with classical libertarian leanings. He received his B.A. in jurisprudence in 1966, then entered Yale Law School, earning his LL.B. in 1968.

During the next four years he taught law at the University of Southern California and met his wife, Eileen, a professional fundraiser. They have three children. At the University of Chicago, Epstein headed the John M. Olin Program in Law and Economics, and in 2001 served as interim dean when his predecessor left unexpectedly. "He filled the gap selflessly. People thought of him as a steady rock," says Chicago colleague Douglas Baird.

In 2005, Epstein began splitting his year between Chicago and New York. "This is a faculty that is convivial and highly professional," he says. "I like the culture." His appointment allows him to keep his connection with the Hoover Institution at Stanford University, where he has been a fellow since 2000, and spoil his granddaughter, Bella. In his leisure time he plays basketball and does crossword puzzles. With typical humility, he notes, "I have progressed from rank amateur to respectable mediocrity, and sometimes surprise myself by finishing a Saturday *New York Times* puzzle."

Ryan Goodman

ANNE AND JOEL EHRENKRANZ PROFESSOR OF LAW

His gentle voice doesn't dominate a panel discussion, yet he's the one to further the debate. He won three best-paper prizes at Yale Law School but forgot to mention that on his résumé. At Harvard Law School, where he has been since 2002, he asked a student to co-teach a workshop, whereas "most would say, 'I'll teach; you'll be my T.A.'," recalls Andrew Woods, now a Hauser Doctoral Researcher, visiting from Cambridge University. And of the twenty-some articles and books that public international scholar Ryan Goodman, just 39, has already published, half are co-authored.

The word "ego" isn't part of Goodman's vocabulary. "He's very unpompous, if you will, which is not an attribute that's in great supply. He's just interested in the scholarship," says George Downs, professor of politics at NYU. "He's more comfortable spreading the credit around," says frequent co-author Derek Jinks of the University of Texas at Austin School of Law. "It isn't about garnering attention for himself. He's all about making the world better."

A one-time debater and an interdisciplinary scholar who holds a Ph.D. in sociology as well as a J.D., both from Yale, Goodman specializes in human rights law as well as humanitarian law, and was director of the Human Rights Program at Harvard, beginning in 2006. "He's had a lot of influence. His scholarship has informed a lot of brief-writing in court," says Harvard colleague Jack Landman Goldsmith. The U.S. Supreme Court heavily relied on Goodman's amicus brief in *Hamdan v. Rumsfeld* when it overturned the government's system of military commissions in 2006.

He built bridges at Harvard between the law school and the John F. Kennedy School of Government, and intends to do the same at NYU, cross-listing his classes with the departments of sociology and political science.

"Ryan Goodman is a leader among an exciting new generation of scholars who combine cutting-edge social science Ph.D. work with deep expertise in international law," says Benedict Kingsbury, Murry and Ida Becker Professor of Law. "His intellectual range makes him an exceptionally perceptive and constructive critic on the work of his academic colleagues, and a wonderful adviser to students."

By all accounts, Goodman is a painstakingly careful and rigorous scholar who is attentive to prior interpretation and uses insights from sociology to frame the argument differently. "He takes his scholarship somewhere that you wouldn't expect," says Mindy Roseman, academic director of the human rights program at Harvard. One such example is "How to Influence States: Socialization and International Human Rights Law" (*Duke Law Journal,* 2004). Conventional wisdom in human rights scholarship postulates that countries are either coerced or persuaded to abide by particular human rights laws. Goodman and co-author Jinks, however, use existing sociological empirical studies to set forth a third reason—acculturation. That is, states tend to emulate their peers. "By identifying this mechanism of acculturation, we can better design human rights treaties to promote good practices," says Goodman. He and Jinks are expanding this theme into a book, *Socializing States: Promoting Human Rights through International Law.*

Goodman's passion for international law and human rights issues was born during his privileged upbringing in apartheid-era South Africa. When the Soweto uprising began in June 1976, he was just six years old. "We were pulled out of school, and I remember seeing tanks rolling down the street," he says. He recalls that his family's black gardener was routinely detained by the police, and that black families were separated. "We had people working in our home while their children were elsewhere. It shook me up," he recalls. "It left an impression. I felt a sense of responsibility for correcting the imbalances of the world."

In 1979, his dad, Basil, then an executive at General Electric, and his mom, Carol-Lee, a ceramicist, left much of their wealth behind to emigrate to the U.S. "They left out of a sense of justice," he says. "They didn't want their children [him and older sister Tanya] growing up with the negative and perverse influences of apartheid."

They settled in Birmingham, Alabama, where, ironically, Goodman witnessed forms of racism "disturbingly reminiscent of South Africa," he says. He rejected the Southern customs of ballroom dancing and debutante cotillions, but joined his high school's debate team, ran track, and played soccer and football. With a debate scholarship to the University of Texas, he placed second in the national championship.

Graduating in 1993 with a B.A. in government and philosophy, as well as a growing interest in human rights, Goodman worked at a grassroots development organization in India. There he realized that he lacked the skills needed to effect social change, so he entered Yale, earning his J.D. in 1999 and his Ph.D. in 2001. Throughout his studies, he continued advocacy work in India as well as South Africa, and interned at the International Criminal Tribunal for the Former Yugoslavia.

Goodman had considered remaining single, fearing that "marriage would take time away from promoting human rights," says Jinks. But then he met Melissa Bender, 36, an infectious-disease researcher. They married in 2006 and had Ella, now two years old.

The depth of the NYU Law faculty in Goodman's area of expertise was a big draw. "Many places engage in superlatives," he says. "But in terms of intellectual activity in international law, NYU is unbeatable." He will jump right in alongside Philip Alston as co-chair and faculty director of the Center for Human Rights and Global Justice.

Goodman is also looking forward to moving with his family to New York. "Ella feeds off the energy of the city, like we do." His wife was born and raised in Manhattan. And an added perk: Goodman can attend meetings at the U.N., where they know not to underestimate the might—in Goodman's case intellectual—of those who speak softly.

Katherine Strandburg

PROFESSOR OF LAW

She didn't successfully crash-land a plane or seize the political spotlight, but Katherine Strandburg nonetheless got her proverbial 15 minutes of fame—via cans of mixed nuts. In 1987, while doing postdoctoral work in physics at Carnegie-Mellon University, Strandburg and her colleagues figured out why Brazil nuts usually make their way to the top of the can, despite being heavier.

"Our explanation was very simple," says the one-time physicist, who used computer simulation to explore the question. Each time the nuts bounce upward, more small spaces than large ones open up beneath them. Over time, the peanuts fall to the bottom because they have more places to go, pushing the Brazil nuts to the top. The team was besieged with media requests.

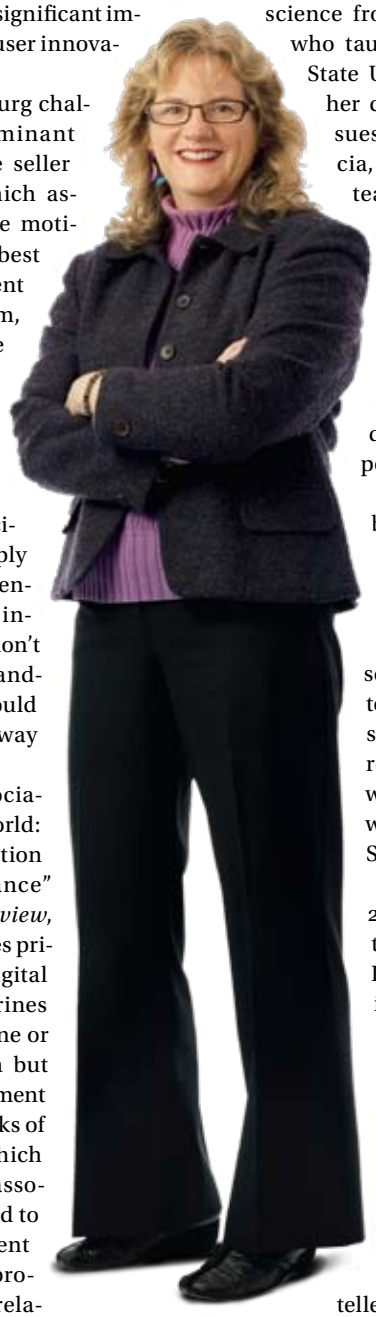
Few physicists get into the *New York Times*, and fewer still are women—only eight percent of all physics doctorates were earned by women when Strandburg received hers from Cornell University in 1984. She'd built a solid reputation with the Condensed Matter Theory Group at Chicago's Argonne National Laboratory, publishing numerous scientific papers on phase transitions—points at which the type of ordering within a physical system changes—such as melting. So leaving the lofty world of physics in 1992 to start anew was a particularly gutsy move. But she realized the aspect of physics she relished most was analytical problem solving, and the problems that intrigued her most were social issues. Strandburg also loves a challenge—she's a second-degree black belt in Seido Karate.

She entered law school at age 35. After earning her J.D. in 1995 from the University of Chicago Law School, she went to Jenner & Block, where she worked on patent and contract cases in which the underlying dispute involved technologies such as telephone billing systems and automobile diagnostic equipment. But in 2002 she switched gears again and moved into academia, teaching at DePaul University College of Law until leaving to join NYU Law.

"Kathy is universally loved and respected," says DePaul law professor Roberta Kwall. "She's intellectually curious. We have wonderful discussions about law, religion, and our daughters. She's not just a one-dimensional thinker."

Strandburg will teach intellectual property and law related to technology and innovation. "She is one of the best-appreciated legal scholars in the field of innovation research," says economist Eric Von Hippel of MIT Sloan School of Management. Her article "Users as Innovators: Implications for Patent Doctrine" (*University of Colorado Law Review*, 2008) "is the first by any legal scholar that analyzes the significant implications of widespread user innovation for patent doctrine."

In that piece, Strandburg challenges today's predominant patent law doctrine, the seller innovator paradigm, which assumes that inventors are motivated by profit that can best be assured through patent protection. This paradigm, however, does not take into account that new products or processes are often invented by the users themselves, e.g., cyclists, snowboarders, and even research scientists, who benefit simply by using their own inventions. "So if people are inventing for reasons that don't need a carrot," says Strandburg, "then maybe we should have exceptions to the way patent law is enforced."



In "Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance" (*Boston College Law Review*, 2008), Strandburg explores privacy protections in our digital world. Current legal doctrines guard the content of phone or Internet communication but do little to prevent government from tracking our networks of contacts. At a time in which more and more people associate digitally, courts need to consider First Amendment freedom of association protections in regulating relational surveillance.

With co-authors Michael Madison and Brett Frischmann, Strandburg is also working on "Constructing Commons in the Cultural Environment," which builds on "Users as Innovators" by proposing a theoretical approach to studying institutions for collaborative innovation, such as Wikipedia and open-source software. Says Strandburg, "My career in both law and physics is characterized by an interest in the way that large-scale, apparently coordinated phenomena emerge from the ground up—be it atoms, as in my studies on melting and quasicrystals; particles, as in the paper on Brazil nuts; or people, as in my studies of scientific collaboration."

Strandburg inherited her talent for science from her dad, Donald, 79, who taught physics at San Jose State University. She acquired her commitment to social issues from her mom, Patricia, 78, a one-time English teacher, who involved her three kids in volunteer activities like working at a summer camp for prisoners' children. In law school, Strandburg helped to reunite a four-year-old girl from Honduras with her mother, a political refugee.

Both parents came from blue-collar families, but let Strandburg know she could be whatever she set her mind to—which changed daily in high school. "One day I wanted to do math, the next I'd be studying the classics," she recalls. The only constant was science; she graduated with a B.S. in physics from Stanford in 1979.

A visiting professor in 2007-08, Strandburg co-taught the Colloquium on Innovation Policy. "She impressed everyone with her enthusiasm and commitment to intellectual life," says her co-teacher, Rochelle Dreyfuss, Pauline Newman Professor of Law. "She brings a unique interdisciplinary perspective that adds to the way we think of intellectual property."

The move to NYU brings her closer to her daughters from her former marriage, Danielle, 23, who lives in the city, and Ariana, 20, who is a student at Swarthmore College near Philadelphia. Once Strandburg settles into her new life in New York, she plans to throw her annual holiday party, to which she and her partner of 16 years, Wai-Kwong Kwok, an experimental scientist at Argonne, invite lawyer, scientist, and karate-enthusiast friends. They sing songs and munch on home-baked cookies and, of course, some mixed nuts. □

All profiles written by Jennifer S. Frey

The Village Vanguard

The five new faculty profiled in the preceding pages join an ensemble of 27 top and rising scholars who have come to the NYU School of Law since 2002. These 32 professors can riff expertly in the areas of constitutional, criminal, tax, corporate, labor, torts, human rights, national security, immigration, international, innovation and environmental law as well as Hebrew law and legal philosophy.

Visiting Faculty

JONATHAN BAKER

Position: Professor of Law, Washington College of Law

When: Spring 2010
Course: Antitrust Law
Representative publications: Co-author, "Reinvigorating Horizontal Merger Enforcement," in *Where the Chicago School Overshot the Mark* (2008); "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation," *Antitrust Law Journal* (2007); "Competition Policy as a Political Bargain," *Antitrust Law Journal* (2006); "The Case for Antitrust Enforcement," *Journal of Economic Perspectives* (2003); "Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws," *NYU Law Review* (2002); co-author, "Empirical Methods in Antitrust Litigation: Review and Critique," *American Law & Economics Review* (1999)
Education: J.D., Harvard Law School; Ph.D. in economics, Stanford University
Related experience: Director, Bureau of Economics, Federal Trade Commission; Senior Economist, President's Council of Economic Advisers; Special Assistant to the Deputy Assistant Attorney General for Economics, Antitrust Division, Department of Justice; Visitor, European Commission Competition Directorate-General

SAMUEL BUELL '92

Position: Associate Professor of Law, Washington University School of Law

When: Spring 2010
Course: Criminal Law
Research: Criminal and civil regulation of economic behaviors; legal construction of mental states; enforcement institutions
Representative publications: "Potentially Perverse Effects of Corporate Civil Liability," in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (2009); "The Upside of Overbreadth," *NYU Law Review* (2008); "Criminal Procedure Within the Firm," *Stanford Law Review* (2007)
Education: J.D., New York University
Clerkship: Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York

ANNETTE GORDON-REED

Position: Professor of Law, New York Law School

When: Spring 2010
Courses: American Legal History in the Early Republic Seminar; Professional Responsibility and the Regulation of Lawyers
Representative publications: *The Hemingses of Monticello: An American Family* (2008); editor, *Race on Trial: Law and Justice in American History* (2002); *Thomas Jefferson and Sally Hemings: An American Controversy* (1997)
Awards: 2009 Pulitzer Prize for *The Hemingses of Monticello*
Education: J.D., Harvard Law School

JOHN LANGBEIN

Position: Sterling Professor of Law and Legal History, Yale Law School

When: Spring 2010
Course: Trusts and Estates: Family Wealth Transmission
Representative publications: Co-author, *History of the Common Law: The Development of Anglo-American Legal Institutions* (2009); "Trust Law as Regulatory Law: The Unum Provident Scandal and Judicial Review of Benefit Denials Under ERISA," *Northwestern University Law Review* (2007); "Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest?" *Yale Law Journal* (2005); *The Origins of Adversary Criminal Trial* (2003)
Education: LL.B., Harvard University; LL.B. and Ph.D., University of Cambridge
Related experience: Uniform Law Commissioner, Connecticut; Principal drafter, Uniform Prudent Investor Act (1994); Member, drafting committees for Uniform Trust Act (2000) and Uniform Principal and Income Act (1997)
Awards: 2006 Coif Award for outstanding American book on law for *The Origins of Adversary Criminal Trial*

IAN HANEY LÓPEZ

Position: John H. Boalt Professor of Law, University of California, Berkeley, School of Law

When: Fall 2009
Courses: Colorblindness; Debating Race and American Law
Research: Reactionary colorblindness on the Supreme Court—the contemporary use of colorblindness to impede rather than promote racial equity
Representative publications: "A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness," *Stanford Law Review* (2007); *Racism on Trial: The Chicano Fight for Justice* (2003); "Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination," *Yale Law Journal* (2000); *White by Law: The Legal Construction of Race* (1996)
Education: J.D., Harvard Law School; M.P.A., Princeton University; M.A. in history, Washington University
Clerkship: Judge Harry Pregerson of the U.S. Court of Appeals for the Ninth Circuit

ERIN MURPHY

Position: Assistant Professor of Law, University of California, Berkeley, School of Law

When: Fall 2009
Courses: Criminal Law; Criminal Procedure: Investigations; Criminal Procedure: Adjudication; Crime and Technology
Representative publications: "Manufacturing Crime: Process, Pretext and Criminal Justice," *Georgetown Law Journal* (2009); "Paradigms of Restraint," *Duke Law Journal* (2008); "The New Forensics:

Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence," *California Law Review* (2007)
Education: J.D., Harvard Law School
Clerkship: Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit

RICHARD NAGAREDA

Position: Professor of Law, Vanderbilt University Law School

When: Fall 2009
Course: Complex Litigation
Research: Class actions; mass torts; interaction of litigation and regulatory systems
Representative publications: "Class Certification in the Age of Aggregate Proof," *NYU Law Review* (2009); "Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism," *Vanderbilt Law Review* (2009); *Mass Torts in a World of Settlement* (2007)
Education: J.D., University of Chicago Law School
Clerkship: Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit
Related experience: Office of Legal Counsel, U.S. Department of Justice

JIDE NZELIBE

Position: Professor of Law, Northwestern University Law School

When: Fall 2009
Course: Contracts
Research: International trade; international business transactions; international law; foreign relations law
Representative publications: Co-author, "Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design," *Harvard Law Review* (2009); "The Case Against Reforming the WTO Enforcement Mechanism," *University of Illinois Law Review* (2008); "Are Congressionally Authorized Wars Perverse?" *Stanford Law Review* (2007)
Education: J.D., Yale Law School; M.P.A., Princeton University
Clerkship: Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit

KATHARINA PISTOR

Position: Michael I. Sovern Professor of Law, Columbia Law School

When: Fall 2009
Courses: Global Financial Market Governance Seminar; Law and Development
Research: Comparative law and institutional development, with special emphasis on corporate governance and financial market development
Representative publications: Co-author, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World* (2008); co-author, "Trade, Law, and Product Complexity," *Review of Economics and Statistics* (2006)
Education: LL.M., University of London; M.P.A., Harvard University; J.S.D., University of Munich; J.D., University of Freiburg

ROBERTA ROMANO

Position: Oscar M. Ruebhausen Professor of Law and Director, Center for the Study of Corporate Law, Yale Law School

When: Spring 2010
Course: Corporations
Research: Regulation of financial instruments and securities markets; corporate governance; state competition for corporate charters
Representative publications: "Does the Sarbanes-Oxley Act Have a Future?" *Yale Journal on Regulation* (2009); co-author, "The Promise and Peril of Corporate Governance Indices," *Columbia Law Review* (2008); "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance," *Yale Law Journal* (2005); *The Advantage of Competitive Federalism for Securities Regulation* (2002); *The Genius of American Corporate Law* (1993)
Education: J.D., Yale Law School; M.A. in history, University of Chicago
Clerkships: Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit

JACQUELINE ROSS

Position: Professor of Law, University of Illinois College of Law
When: 2009-10
Courses: Comparative Criminal Procedure Seminar; Criminal Procedure: Investigations; Evidence
Research: A comparative study of undercover policing in the United States, Italy, Germany, and France; comparative research about intelligence-gathering in immigrant communities in the United States and France

Representative publications: "Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany," *Oxford Journal of Legal Studies* (2008); "The Place of Covert Policing in Democratic Societies: A Comparative Study of the United States and Germany," *American Journal of Comparative Law* (2007)
Education: J.D., University of Chicago
Clerkship: Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit
Related experience: Assistant U.S. Attorney, Northern District of Illinois (Chicago) and District of Massachusetts (Boston)

ALAN SCHWARTZ

Position: Sterling Professor of Law and Professor of Management, Yale University

When: Fall 2009
Courses: Contracts; Bankruptcy; Commercial Law; Mergers and Acquisitions
Research: Contracts; bankruptcy; mergers and acquisitions; behavioral economics
Representative publications: Co-author, "Market Damages, Efficient Contracting, and the Economic Waste Fallacy," *Columbia Law Review* (2008); "How Much Irrationality Does the Market Permit?" *Journal of Legal Studies* (2008); co-author, *Payment Systems and Credit Instruments* (2007)
Education: LL.B., Yale Law School

DAVID WALKER

Position: Professor of Law, Boston University School of Law
When: Fall 2009
Course: Income Taxation
Research: Corporate law; taxation; executive compensation; law and economics
Representative publications: Co-author, "Book/Tax Conformity and Equity Compensation," *Tax Law Review* (2009);

"Financial Accounting and Corporate Behavior," *Washington and Lee Law Review* (2007); "Unpacking Backdating: Economic Analysis and Observations on the Stock Option Scandal," *Boston University Law Review* (2007)

Education: J.D., Harvard University
Clerkship: Judge Karen Nelson Moore of the U.S. Court of Appeals for the Sixth Circuit

TOBIAS WOLFF

Position: Professor of Law, University of Pennsylvania Law School

When: Spring 2010
Course: Conflict of Laws
Research: Civil procedure; complex litigation; conflict of laws; constitutional law; First Amendment; law and sexuality
Representative publications: "Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action," *University of Pennsylvania Law Review* (2008); "Preclusion in Class Action Litigation," *Columbia Law Review* (2005); "Interest Analysis in Interjurisdictional Marriage Disputes," *University of Pennsylvania Law Review* (2005); "Political Representation and Accountability Under Don't Ask, Don't Tell," *Iowa Law Review* (2004)
Education: J.D., Yale Law School
Clerkships: Judge Betty Binns Fletcher and Judge William A. Norris of the U.S. Court of Appeals for the Ninth Circuit

Multi-Year Visiting Faculty

CHARLES CAMERON

Position: Professor of Politics and Public Affairs, Princeton University

When: 2009-10
Course: Political Environment of the Law
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Representative publications: "Changing Supreme Court Policy Through Appointments: The Impact of a New Justice," *Minnesota Law Review* (2009); co-author, "Bargaining and Opinion Assignment on the U.S. Supreme Court," *Journal of Law, Economics, & Organization* (2007); *Veto Bargaining: Presidents and the Politics of Negative Power* (2000)
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Representative publications: "Tobacco Control Strategies: Past Efficacy and Future Promise," *Loyola of Los Angeles Law Review* (2008); co-author, *Tort Law and Alternatives: Cases and Materials* (2006); "The Renaissance of Accident Law Plans Revisited," *Maryland Law Review* (2005); co-editor, *Torts Stories* (2003)
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Courses: Antitrust Law and Economics Seminar; Quantitative Methods in Law Seminar
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Representative publications: *War and Liberty: An American Dilemma: 1790 to the Present* (2007); *Top Secret: When Our Government Keeps Us in the Dark* (2007); *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004)
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Representative publications: Editor, *The Judges of the New York Court of Appeals: A Biographical History* (2007); issue co-editor, *New York State Bar Journal* (1993, 1994, 1997, 2001); *New York's New Drug Laws and Sentencing Statutes* (1973)
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Representative publications: *Women, Law and Human Rights: An African Perspective* (2005); consultancy reports for the Lord Chancellor's Department on why women and ethnic minorities are underrepresented in the ranks of Queens Counsel (co-author), for the Minority Rights Group on gender and indigeneity (co-author), and for the United Nations on laws that discriminate against women
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Representative publications: Co-editor, *Making European Private Law: Governance Design* (2008); co-editor, *Legal Orderings and Economic Institutions* (2007); editor, *Reframing Self-Regulation in European Private Law* (2006); editor, *The Institutional Framework of European Private Law* (2006)
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Course: Copyright Law in the Digital Era
Research: Book in progress on the evolving structures of governances in social networks; legal institutions that facilitate private and public control over the production and dissemination of information
Representative publications: Co-author, *The Limits of Analysis: Law and Economics of Intellectual Property in the Digital Age* (forthcoming, 2009); co-editor, *Law and Information Technology* (forthcoming, 2009); *Intellectual Property in the Information Age* (2004); co-author, *Law, Economics and Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law* (2004); co-editor, *The Commodification of Information* (2002)

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Representative publications: *Comparative Matters: Legal Studies for the 21st Century* (forthcoming, 2010); *Sacred Judgments: The Challenge of Constitutional Theocracy* (forthcoming, 2010); *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004)
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Representative publication: *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (2006)
Education: LL.B., National University of Singapore; LL.M. and J.S.D., Yale Law School
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Corporate Self-Regulation and the Low-Wage Workplace

As large companies increasingly rely on outsourcing, especially for less-skilled labor, **CYNTHIA ESTLUND** argues they should not escape the responsibility of ensuring lawful wages and working conditions.

Economic inequality is growing in the United States. From 1979 to 2005, the real family income of the poorest 20 percent of American households rose less than one percent, while that of the richest 20 percent rose by 49 percent, and that of the richest one percent more than doubled. As John Edwards once sought to impress upon voters with his "Two Americas" pitch, the rich have gotten much richer, while the poor and near-poor are working harder to stay in the same place.

Economic inequality is reflected, and largely created, in the labor market, and in the huge disparity in wages and working conditions between the top and the bottom. From 1979 to 2005, the real hourly wage fell by 2.3 percent for workers in the bottom 10 percent of the labor market, while rising by 33 percent for workers in the top five percent, and by much more for the top one percent.

In part, these disparities reflect the growing gulf between the top and the bottom of the wage scale within companies. For example, the ratio between CEO pay and average employee pay in the same company grew from 24-to-1 in 1979 to 262-to-1 in 2005. That growing disparity is especially striking given the extent to which firms during this same period contracted out much of their lowest-wage work to outside firms. The disparity between CEO pay and employee pay has skyrocketed even though much of the bottom of the wage scale within large companies has effectively been lopped off their payrolls.

That fact reminds us that growing wage disparities between poor and rich wage earners reflect not only disparities within companies but also disparities between big, rich companies and smaller, less profitable companies. Within many Fortune 500 companies, core employees enjoy generous pay and benefits, sophisticated human resources policies, family-friendly practices, and enviable amenities. Top firms compete to be "employers of choice" for workers with scarce skills. We need only think of the Googleplex, where apparently champagne flows from the drinking fountains.

At the bottom of the labor market—at the bottom of large company hierarchies and among smaller, poorer firms—are the working poor and near-poor: janitors and housekeepers, hotel and restaurant workers, garment manufacturing workers, food processing workers, retail sales clerks, call center operators, and hospital orderlies. Pay scales are too low—even when they are lawful—to lift these workers' families out of poverty. But in many of these low-wage jobs, labor standards laws are broken daily. Wage and overtime violations, and in many sectors health and safety violations, are rampant. Some low-wage work is virtually unregulated—paid in cash and without regard to minimum wage and overtime requirements and state-mandated payroll taxes. Even among reputable employers, one finds illegal cost-cutting practices like demanding unpaid off-the-clock work, shaving time off time sheets, and misclassifying employees as independent contractors to avoid employment laws. Among advanced economies, the U.S. has an unusually large low-wage sector, and within that, an unusually large informal economy in which labor standards are essentially unregulated.

Interestingly, many low-wage workers supply labor to big Fortune 500 firms. Some do so directly, like sales associates at Wal-Mart or Target, or chicken processors at Tyson Foods; others do so through contractors, like the folks who mop the floors and take out the trash at Fortune 500 headquarters. So the tale of "Two Americas" ends up looking a bit like *Upstairs, Downstairs*, the British television drama from the 1970s depicting the lives of servants and their upstairs masters in a large townhouse in early 20th-century London. We will return to the fact that many among the working poor are working for the rich who are getting richer.

Back in the New Deal, Congress attacked the problem of low-wage work with a two-pronged strategy: The National Labor Relations Act gave workers the freedom to make common cause and form unions to bargain collectively with employers; and the Fair Labor Standards Act established a nationwide floor on wages, an overtime premium for excess work hours, and a ban on most child labor. Those twin commitments to industrial democracy through collective bargaining and to decent minimum wages and working conditions set the template for modern labor and employment laws.

Since then, labor law's system of industrial democracy has faltered badly, and union membership in the private sector has fallen below eight percent. On the other hand, employment mandates have proliferated. We have laws regulating wages and hours, health and safety, pensions and benefits, family and medical leave, and discrimination. What these laws amount to is a societal guarantee of decent work: decent wages and working conditions, and protections against some forms of employer abuse.

Unfortunately, society has not made good on that guarantee. For even if minimum labor standards were adequate in principle, they are widely underenforced, even ignored, at the bottom of the labor market. Workers are largely responsible for enforcing their own legal rights at work, and unorganized low-wage workers, who enjoy neither collective representation nor individual bargaining power, are unable to do so.

Obviously, downward pressure on wages and labor standards has economic roots. Transnational mobility of goods and services subjects domestic producers to competition from low-wage regions. Transnational mobility of capital allows investors to seek profits globally, which pressures firms to keep profit margins high and costs low. Transnational mobility of labor, and the growing migration of poor workers to richer countries, swells the supply of unskilled labor in the rich world. Together, these economic dynamics create both incentives and opportunities to reduce labor costs and violate labor standards; they push employers to compete by reducing wages, and they make it easier to do so by giving employers greater access to cheaper labor both domestically and abroad.

In the U.S., the downward pressure on wages and labor standards often outweighs the pressure to comply with legal standards. Especially for employers at the bottom of the labor market, enforcement is rare and its consequences are either manageable or escapable; they may rationally decide to ignore legal constraints. That puts more competitive pressure on law-abiding employers to follow suit.

Can the law be deployed to induce firms to extend their self-regulatory systems to include the labor practices of low-wage contractors that supply essential services?

To be sure, a serious public commitment to enforcing labor standards may entail tradeoffs—some lost jobs or higher prices (though economists debate whether and to what degree that is true). Still, the place to consider those tradeoffs is in setting the legal standards themselves. Once having done so, it is corrosive and counterproductive to fail to enforce those standards and to let lawbreakers undercut law-abiding employers.

So more public enforcement is necessary. But there will never be enough inspectors for the government to do it alone. (And for marginal, fly-by-night employers, litigation is even less of a threat than is government enforcement.) The challenge for policymakers and advocates is to figure out how to leverage limited regulatory resources, public and private, into a viable system for improving labor standards and enforcing employee rights in the workplaces and jobs in which they are most degraded and threatened. That challenge is emblematic of challenges faced by modern regulation generally.

The problem of securing corporate compliance with public norms is not limited to the low-wage workplace or to employment law, and it is not limited to the United States. Across the world, there is a growing conviction that traditional "command-and-control" regulation is losing its grip in a technologically supercharged global economy, and cannot keep up with the increasingly complex and footloose organizations and networks through which goods and services are produced and distributed. Yet there is also a recognition that those organizations and networks themselves have prodigious internal regulatory resources—in the aggregate, far more than governments have. Many scholars and policymakers have concluded that law can effectively regulate complex organizations in modern society only by shaping those organizations' own processes of self-regulation and inducing organizations to internalize public values.

Law often promotes self-regulation not by mandating it but by rewarding it: A firm that maintains what the law regards as effective self-regulatory systems may qualify for a less adversarial or less punitive regime. So, for example, under the federal criminal law that governs corporations, organizations with effective compliance programs can get a reduced sentence or leniency at the charging phase if criminal wrongdoing nonetheless occurs inside the organization. Similarly, under Title VII, if an employer maintains policies and complaint processes that are reasonably calculated to prevent and remedy discrimination and harassment, it may avoid liability for punitive damages and for some harassment claims altogether. In various settings, the law uses the prospect of official carrots and sticks to induce firms to undertake the project of ensuring compliance with societal norms. The extent of corporate resources that go into compliance programs at major companies is impressive, and is crucial to the law's ability to effectively regulate complex organizations in modern society.

Yet a system that rewards self-regulation with lower penalties and less scrutiny is vulnerable to cheating. It risks putting foxes in charge of the chicken coops—or maybe the chicken processing plants. Consider Tyson Foods, Inc., which touts its Team Member Bill of Rights, including the right to a safe workplace, but whose employees suffer high rates of injury on its speedy poultry processing lines. If public agencies rely heavily on corporate self-regulation to

secure compliance, how do they avoid being hoodwinked by "cosmetic compliance"?

I argue in a forthcoming book that it is essential to build safeguards against cosmetic compliance into firms' self-regulatory systems; that one crucial safeguard is effective institutional participation by stakeholder beneficiaries; and that, in the case of labor and employment laws, that requires collective employee representation. So when courts and regulators hold out regulatory concessions—a less adversarial enforcement track, leniency in charging, immunity from punitive damages, or the like—to firms that maintain effective internal compliance systems, one of the elements of efficacy they should demand is effective employee participation. A system of well-regulated self-regulation in which employees have an independent voice can better advance public goals than traditional command-and-control regulation alone. It is a strategy for inducing large, brand-conscious firms to live up to their legal obligations and their public commitments to employee welfare and social responsibility, even for their lowest-paid workers.

But what about the marginal firms with little or no reputation or capital, in which employee rights and labor standards are often the most degraded? Far from investing in corporate compliance or self-regulation, many of those firms operate as virtual outlaws, beyond the sight and reach of regulators. Is the idea of regulated self-regulation destined to leave behind that large segment of the low-wage workforce? Or can the law be deployed to induce major firms to extend their self-regulatory systems to include the labor practices of low-wage contractors that supply their essential labor needs? In many of these cases, the law *can*, *should*, and arguably *does* do just that.

Let us begin with the question of feasibility. In recent decades, employers at the top of these contracting ladders have developed extraordinary internal regulatory resources—not only sophisticated internal corporate compliance systems, but also elaborate systems for monitoring the quality of the goods or services their contractors provide. To be sure, these two systems of control may currently be lodged in different parts of the corporate hierarchy. To the extent user firms are held liable for contractors' labor and employment violations, they would have to link the two systems—to extend oversight of contractors to monitor not only the quality of goods and services but also the conditions under which they are produced, and to extend corporate compliance programs to include contractors' compliance.

Even without a threat of legal liability, some big multinational firms have begun to do this in response to the risk of "social liability" for scandalously poor labor conditions in overseas factories where their goods are produced. For example, Nike has developed increasingly sophisticated methods of monitoring and improving labor standards for 800,000 workers in its global supply chains.

Unfortunately, some supply-chain monitoring programs appear better designed to fend off public criticism than to improve labor standards; the risk of "cosmetic compliance" and the need for an effective employee voice apply here, too. Moreover, these programs are concentrated in sectors like apparel, footwear, and toys that are sensitive to organized consumer outrage, for that is about the only leverage advocates have in the global supply-chain context. But at least in the domestic context, the law can supply more concrete incentives for firms to monitor their suppliers and contractors.

Monitoring is not costless. But the cost of firms' monitoring their own contractors' labor practices is likely to be much lower than the cost of effective public enforcement; and the more a firm is already monitoring contractors' operations in the interest of quality, speed, and reliability of production, the less it should cost to extend monitoring to include wages and working conditions. The biggest cost to user firms is likely to be the increased contract price to cover wages and working conditions that meet minimum legal standards; but that must be counted not as a social cost but as a benefit, for it strengthens the legal floor that supports individual and collective efforts by workers at the bottom of the labor market to bargain for better wages and working conditions.

So it is often feasible and cost-effective to hold user firms liable for the labor violations of their contractors. Moreover, it is fair to do so because user firms both benefit economically from and predictably contribute to the erosion of labor standards by their growing practice of contracting out, or outsourcing, low-skill, labor-intensive parts of their business.

In the parlance of the theory of the firm, companies have been "making" less and "buying" more, particularly when it comes to discrete labor-intensive tasks that require little capital or specialized skill. They do so to reduce costs. Where do the cost savings come from?

First, outsourcing cuts workers off from the higher wages and benefits that often prevail within the user employer's workforce. The informal dynamics of internal labor markets tend to compress wage differentials, and to push up wages at the bottom of the internal market above what the relevant skills may fetch on the external labor market. Those dynamics may be formalized by a collective bargaining agreement, and are reinforced by federal tax laws that discourage firms from discriminating against lower-paid employees in benefits such as health insurance and pensions. Outsourcing low-skilled work allows a firm to escape these constraints and to fill its labor needs at the lowest wages that the external market will bear. There is nothing illegal in that, though it contributes to falling wages at the bottom of the labor market.

Other aspects of outsourcing predictably promote illegal labor practices. Outsourcing puts contractors into a literal bidding war; when labor costs make up the lion's share of their costs, contractors compete by pressing down wages to whatever the market (and the regulatory regime) will allow. Moreover, these contractors pose a chronic regulatory challenge; with little capital or reputation at stake, they fly below the regulatory radar, and may be judgment-proof or prone to disappear in case of enforcement. And because immigration laws are also underenforced in this sector, low-wage contractors can and do rely heavily on undocumented immigrant workers who are particularly unlikely to complain about substandard wages or working conditions.

The upshot is that many low-skill jobs that used to be performed within large, integrated firms are now often performed within a more thoroughly low-wage environment by contractors who are in a race to the bottom of the wage scale and are beyond the gaze of the public and regulators. The practice of contracting out work under these circumstances puts downward pressure on wages and labor standards that is predictable and profitable, if not intentional. That is the basic logic of holding those at the top accountable for the illegalities that flourish at the bottom of the labor market.

In fact, the most important law in the low-wage landscape, the Fair Labor Standards Act (FLSA) of 1938, aimed to do just that. New Deal reformers were familiar with the practice of contracting out labor-intensive parts of a business to small, minimally capitalized contractors to cut labor costs. The so-called "sweating system" was especially common in garment manufacturing. It was precisely to reach through those contracting arrangements that Congress, following a pattern set by child labor laws, defined the term "employ" in the FLSA to include "to suffer or permit to work."

Under that broad standard, the user employer was responsible for wage and overtime violations if the work was an integral part of its business, and if the employer had the means to learn that the work was being done and the economic power to prevent it. The goal behind this broad standard of employer liability was to eliminate substandard wages and working conditions, to eliminate the competitive advantage of employers who used these contracting arrangements to lower labor costs, and to protect responsible employers from that unfair competition.

The original meaning and purpose of the phrase "suffer or permit to work" has been exhaustively documented by legal scholars, but it has not quite won the day in court. Many courts seem convinced that Congress could not have meant to deprive employers of the ability to structure their contracting arrangements however they wish to compete effectively. That assumption is half right and half wrong: Congress did not prohibit any contracting-out arrangements, but it did seek to eliminate employers' ability to use them in a way that fostered substandard labor conditions and undercut responsible employers.

It may be an uphill battle to restore the original meaning of "employ" under the FLSA. But it is a battle worth fighting—perhaps on legislative terrain rather than in the courts—by policymakers and advocates seeking to improve enforcement of labor standards in low-wage labor markets.

Economic inequality may continue to grow as those with capital and scarce skills continue to take the lion's share of the social product in a globalized economy. Even in a political climate that is more worker-friendly and readier to regulate the excesses of the financial titans, it is unlikely that we will seriously curb the ability of the rich to get richer. What we can do, and what we must do if we want to live in a humane and cohesive democratic society, is to improve the conditions that prevail at the bottom of the economy, and to ensure that full-time work secures the material makings of a decent life. One constructive step in that direction is to ensure that the firms at the top of the heap—those that are reaping the greatest profits from globalization—take responsibility for securing decent and lawful wages and working conditions for the workers who supply them with essential labor inputs. □

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The Significance of the Local in Immigration Regulation

CRISTINA RODRÍGUEZ examines how active participation by states and localities in managing migration justifies a reconsideration of the federal exclusivity principle.

The processes of global integration are changing how governments do business. Nowhere is this change more apparent than in the mechanisms lawmakers at every level of government are employing to respond to the ways in which immigration is reshaping American society. Among the notable regulatory trends of recent years is the rise of state and local efforts designed to control immigrant movement, define immigrant access to government, and regulate the practices of those with whom immigrants associate in the private sphere, namely employers and landlords. In the first six months of 2007 alone, more than 1,400 bills addressing immigration in some capacity were introduced in state legislatures across the country, and nearly 200 of those bills became law.

States always have been active in immigration regulation, of course. In the early republic, state inspection laws and the imposition of duties on migrants' entrance functioned as immigration law. In the 20th century, states made occasional attempts to restrict immigrant access to public benefits and crack down on employers who hired unauthorized workers. But the upward trend in sub-federal immigration regulation in the 21st century has been dramatic. More important, the current activity, despite having historical antecedents, is in significant tension with a doctrine articulated by the Supreme Court in 1889: Immigration control is the exclusive responsibility of the federal government.

Scholars who have addressed this tension between state practice and the exclusivity principle largely have focused on whether the national government or the states are better at protecting immigrants' interests—empirical claims for which the evidence is mixed. Missing from the discussion is a functional account that explains why state and local measures have arisen with increasing frequency over the past five to 10 years, and how this reality should shape our conceptual and doctrinal understandings of immigration regulation. I provide that missing functional account and argue that the federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole manage the social and cultural change that immigration inevitably produces. The primary function states and localities play in this structure is to integrate immigrants, legal and illegal alike, into the body politic.

The federal exclusivity principle, on its surface, is consistent with the proposition that states help immigrants integrate. But I demonstrate that the integration challenge sometimes requires states and localities to take steps that resemble immigration controls. In fact, the process of immigrant integration sometimes depends on states and localities adopting positions in tension with federal immigration policy, particularly in relation to unlawful immigration. Managing migration writ large depends on policy experimentation that sometimes produces contradictory results. In fact, the evidence of this policy experimentation helps to undermine the federal exclusivity principle as a doctrinal matter. Federal exclusivity was neither a matter of original practice, nor is it specified in the Constitution. Rather, the concept of exclusive federal control emerged through Supreme Court doctrine for functional reasons: the perceived need to have a single sovereign manage foreign affairs. Even if those functional concerns were valid when declared, their foundations have since eroded, and federal exclusivity has become a formal doctrine without strong constitutional or practical justification.

Abandoning federal exclusivity does not mean that the federal government should not exercise strong leadership. Under a functional analysis, efficiency and coherence require federal control over the formal admissions and removal processes. Strong federal leadership also may be necessary to prevent states and localities from imposing certain externalities on their neighbors.

What is more, some state and local immigration-related activity may come into conflict with generally applicable federal (and state) constitutional and civil rights protections, and I do not suggest relaxing these limitations. But the functional account I provide should occasion some shifts in the doctrine governing preemption, primarily by leading courts to assess potential conflicts between federal and state law without giving extra weight to an overriding national interest in immigration regulation. Even more important, my functional account should give rise to new lawmaking norms based on anti-preemption presumptions.

In addition to changing the terms of the immigration debate, the integrated system I describe highlights several crucial features of federalism generally. It reveals the vital sorting function federalism performs—a function crucial to managing demographic change in a country as large and diverse as the United States. Relatedly, my account demonstrates how federalism can be leveraged to manage the effects of globalization and economic interdependence, highlighting that federalism serves as a crucial mechanism for shaping and managing national identity. In the end, the story I tell reveals why our understanding of the allocation of powers within the federal system must be responsive to the arrangements that the various levels of government have devised to manage the challenges that cross their jurisdictions.

STATES AND LOCALITIES AS AGENTS OF INTEGRATION

The federal exclusivity principle is embodied in the Supreme Court's strong statement in *De Canas v. Bica* that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," and that exclusive federal control over immigration "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." But lawmakers today face three trends, each of which is contributing to the de facto demise of this principle. First, since 1990, immigrants have been arriving in record numbers, primarily from Asia and Latin America. The country is in the midst of a demographic reordering similar in scope to the heavy Italian and Eastern European influx from 1890 to 1920. Second, the Pew Hispanic Center has estimated that, in 2006, approximately 11.5 million of these immigrants were unauthorized—a factor that contributes to the intensity of current debate, even as an economic downturn has led to a decline in the unauthorized population. Finally, migrants are bypassing traditional urban centers and gateway states, heading for destinations—namely in the Southeast—whose experience coping with linguistic and cultural diversity is virtually nonexistent.

State and local lawmakers are responding to shifting demography by attempting to exert control over immigrant movement in extraordinarily varied ways, particularly when it comes to how best to deal with the reality of unauthorized immigration. Whereas some actors have sought to abate immigration by assisting federal enforcement efforts and penalizing employers and landlords who associate with unlawful immigrants, others have decided to learn to live with the new demography. These lawmakers have taken bold steps to integrate even unauthorized immigrants, through policies such as issuing identification cards, making in-state college tuition available, declaring cities to be sanctuaries from immigration enforcement, and setting up centers where day laborers can gather to find employment.

This appearance of divergent state and local measures is not simply a symptom of the federal government's failures. Instead, it reflects the unsuitability of a strictly federal response to immigration. The continued mobilization of the exclusivity principle demonstrates that lawyers and legal scholars have only just begun to discuss what Saskia Sassen identifies, in *Territory, Authority, Rights*, as the globalization processes that "take place deep inside territories and institutional domains that have largely been constructed in national terms." In what follows, I focus briefly on two examples of state and local divergence to illustrate these conclusions: the adoption of noncooperation policies and in-state tuition benefits for unauthorized students.

For decades, major cities and a few small towns have adopted so-called sanctuary laws, or statutes, resolutions, and executive orders that limit the ability of local and state authorities to cooperate with federal officials in the enforcement of immigration laws. The sanctuary movement took shape in the 1980s, when churches and other private organizations began providing safe havens for nationals of El Salvador and Guatemala, who had fled brutal civil wars and were thought to have been denied asylum wrongfully. Cities and states supported these efforts with resolutions declaring that such asylum seekers need not fear arrest in their jurisdictions.

In some quarters, these laws evolved into general ordinances that prohibited local

law enforcement from conveying information about individuals' immigration status to federal officials. Eventually, cities with no ties to the original sanctuary movement began passing similar generalist resolutions prohibiting information disclosure by public authorities. Many of these resolutions served as direct responses to the federal government's expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws in the years after the attacks of September 11, 2001.

In 1996, in the midst of these developments, Congress passed two provisions that prohibited local governments from preventing their employees from voluntarily conveying information regarding immigration status to federal authorities. The enforcement issue thus highlights the tension between federal, state, and local approaches to managing migration. On the one hand, localities that have adopted sanctuary laws have sought to define for themselves the parameters of their law enforcement authority and the duties of their workforce, particularly of those civil servants who perform health and safety functions. On the other hand, the federal government has sought to remove state and local obstacles to its immigration enforcement and information-gathering goals. Each entity has clearly legitimate objectives that are nonetheless difficult to reconcile.

"What's our immigration policy?"

The sanctuary phenomenon underscores the complex dynamic presented by immigration enforcement, especially when understood in contrast to the willingness of some police departments to enter into 287(g) agreements with the federal government, deputizing state and local officials to enforce federal immigration laws directly. The cities that have passed sanctuary laws are motivated by at least three concerns. First, the laws reflect localities' desire to reduce immigrant suspicion of the police and to ensure that immigrant communities cooperate with law enforcement. Second, the anti-information sharing laws reflect the determination that ensuring effective delivery of services requires promoting trust in government generally. Finally, woven into these policy objectives are political judgments that reflect broader ideological conflict. The non-cooperation laws suggest a general desire to make government institutions accessible to all people, regardless of legal status, by reducing the perception among immigrants that interaction with public officials always raises the specter of deportation.

The in-state tuition issue presents a similar dynamic. By 2007, at least 10 states had passed laws that permitted unauthorized students to pay in-state tuition at public colleges, including major immigrant-receiving states such as Texas, California, New York, and Illinois, as well as Utah and Nebraska. A federal law adopted in 1996, however, provides that unauthorized immigrations "shall not be eligible on the basis of residence within a State for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit." And yet, most of the states that offer in-state tuition benefits have taken this step since 1996—if not outright defying the federal government, then at least rejecting Congress's conclusion that unauthorized immigrants' access to public benefits should be limited. The tuition-benefit states have negotiated around section 505 by conditioning the benefit not on residency, but on school attendance in the state.

This ongoing debate powerfully underscores that communities reach different conclusions on whether and how to incorporate unauthorized immigrants. This divergence can be explained by the mutually reinforcing imperatives of economic and political integration. As the Urban Institute estimated in 2003, approximately 65,000 unauthorized students graduate from American high schools each year. As the American Association for State Colleges and Universities has observed, a large portion of these students are likely to remain in the United States, and so it is in the fiscal and economic interests of states to enable unauthorized immigrants to acquire some post-secondary education. In addition, many states acknowledge that the parents of unauthorized students pay taxes to the state, justifying extension of the benefit on fairness grounds.

But embedded within this pragmatism are also judgments about how adult illegal immigrants differ from their children, including in their moral stature. In-state tuition states have concluded that unauthorized students who have attended state high schools are unlikely to return to their countries of national origin and that unauthorized students, by virtue of their education in the public schools, have been assimilated into American life. Many states also, likely, have concluded that it is illiberal to permit the condition of illegality and

associated disabilities to be passed from parents to children, or that we should prevent the emergence of the inherited castes that would result from the failure to break the chain of illegality.

REIMAGINING THE FEDERAL-STATE-LOCAL RELATIONSHIP

The question now becomes how to reformulate the constitutional doctrines and lawmaking presumptions that structure the immigration debate to accommodate how states and localities themselves have been adjusting to a changed world. My answer is that we must develop presumptions that simultaneously facilitate power sharing by different levels of government and tolerate tension between federal objectives and state and local interests. In short, our conceptions of preemption should respond to the rise of de facto power sharing between the federal government and state and local entities through a "normalization" of the immigration power. Perhaps more important, the regime I describe should lead state and federal lawmakers to employ anti-preemption presumptions in their immigration-related decision-making.

Courts must first jettison the obfuscating overlay of the exclusivity principle and treat immigration regulation as subject to the standard Supremacy Clause preemption inquiry. There is no reason to fear that abandoning exclusivity will compromise federal power over immigration; general, albeit contested, doctrines exist to manage the federal-state relationship. Abandoning exclusivity instead would bring precision to the doctrinal assessment of state and local immigration regulations. In fact, courts, without saying so, have moved in this direction, making exclusivity more bark than bite. Courts often begin their analysis with strong statements of exclusivity but then strike down state laws on a conflict-preemption basis. The fact that the federal government has regulated so comprehensively in the immigration field means that a statutory basis for preemption is not difficult to find, and so few, if any, litigation outcomes hinge on a constitutional holding. That said, the exclusivity principle does still lead federal courts to put a thumb on the scale in favor of the federal government when a statutory preemption issue is not straightforward—a practice I contend should be rethought.

The more significant shift I advocate is a conceptual one that would support a framework for congressional decision-making that emphasizes two strategies: congressional restraint and cooperative federalism. This conceptual aspiration reflects what Roderick Hills describes as the proper understanding of federalism, according to which "the benefits of federalism…rest on how the federal and state governments interact, not in how they act in isolation from each other."

Instead of jumping to preempt or occupy territory, Congress should adopt a presumption against preemption. Whereas such a presumption is arguably inappropriate when applied by courts because it favors the state interest over the federal, it would be appropriate for Congress to think twice before preempting state laws. Congress should refrain not only from preempting state actions in areas that might seem to be in tension with federal objectives, but also from requiring state and local officials to participate in immigration enforcement activities, either directly (which would raise commandeering issues) or indirectly, through Spending Clause–type incentives. The presumption should have particular purchase when measures through which states and localities are working to secure the trust and integration of immigrant communities are at issue.

Congress also should actively promote cooperative activity between state and local officials and the federal government. Cooperation can provide states with an avenue to deal directly with the consequences of immigration, while providing a form of federal supervision to ensure that a state's action is not motivated by animus, or does not impose unwarranted externalities on other states. The cooperation I envision could take several forms. First, Congress could expressly authorize states to adopt measures that state officials might otherwise worry are outside their power or that are politically unpalatable without some cover from Congress, as with the DREAM Act—a bill that would enable unauthorized high school students to attend college or enlist in the military and acquire legal status. Similarly, Congress could devolve authority to states to exercise decision-making capacity in areas that might otherwise be off-limits under current law, as in state implementation of federally funded programs such as Medicaid. The touchstone for congressional policymaking in this area should be not whether Congress is authorizing states and localities to do positive or negative things vis-à-vis immigrants, but whether the policy enhances or shuts down state decision-making capacity and balances the competing goals of the system. In its most productive form, cooperation would involve enlisting the states in immigration-related policy. States could become directly involved in setting labor admissions standards, for example, by providing their relative preferences and expertise directly to an administrative policy process coordinated by the federal government.

CONCLUSION

Controlling who crosses its borders is an act of self-definition and security promotion for a nation-state, and so immigration is a federal issue. Managing migration requires uniform rules governing who may enter and who forfeits the right to remain, to promote administrative efficiency and sustain an integrated national economy. But immigration regulation is not a zero-sum game. Questions of who should belong to a political community, and who should be allowed to cross borders, are also global and local in scope. To emphasize the roles being played by states and localities in regulating immigration is not to suggest that national sovereignty is a mirage, that national citizenship is no longer relevant, or that the national is disappearing in the face of the global. Rather, global forces, as exemplified by the migration of people across borders, are putting pressure on the national in ways that require disaggregated decision-making. Though conceptions of national citizenship provide us with a vocabulary for understanding the effects of immigration, the middling structures of the nation-state cannot capture the diverse forms of membership needed to assimilate the effects of global trends—particularly effects that come in human form, with families. The center of gravity in the immigration context has shifted, revealing that the level of government we might choose to deal with certain issues is historically and politically contingent. It is time we adapt to the contingencies of today and rethink immigration federalism. □

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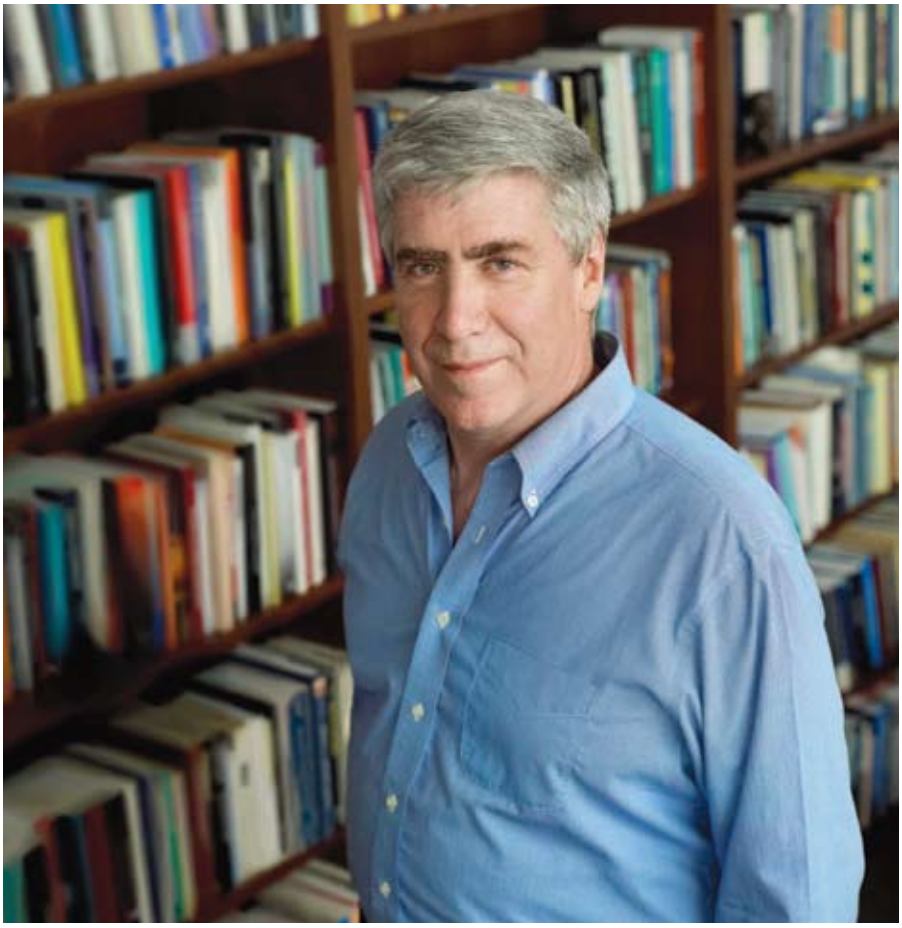
The Concept and the Rule of Law

JEREMY WALDRON notes that a deeper exploration of the idea of law leads to a richer understanding of the Rule of Law as encompassing procedural and institutional elements, aspects that legal philosophers often neglect.



THE RULE OF LAW IS ONE OF THE most important political ideals of our time. Open any newspaper and you will see the Rule of Law cited and deployed as a benchmark of political legitimacy. Here are a few examples, plucked at random from the world's press:

- As a November 2007 *New York Times* editorial states, when President Musharaff of Pakistan fired the chief justice of the Supreme Court of Pakistan and had him placed under house arrest, Musharaff's actions were seen around the world as a crisis of the Rule of Law. Law societies and bar associations all over the world protested and, in Pakistan itself, thousands of judges and lawyers demonstrated in the streets and hundreds of them were beaten and arrested.
- A February 2008 *Financial Times* editorial lamented that the "[a]bsence of the Rule of Law undermines Russia's economy." It associated the absence of the Rule of Law with the irregularity of the Putin regime's proceedings against Mikhail Khodorkovsky. But the newspaper also insisted more generally that a prosperous market economy cannot flourish without the Rule of Law. "Investment dries up as Rule of Law seeps away in Russia," was the headline of a March 2005 article.
- All sorts of practices and policies associated with the war on terrorism have been evaluated and found wanting against the criterion of the Rule of Law. The most prominent has been the incarceration of hundreds of detainees by the United States at Guantánamo Bay in Cuba. A few days after the publication of the editorial on Russia that I mentioned, the *Financial Times*'s editorial board thundered again: "Military tribunals are not the way: Guantánamo is beyond the Rule of Law and should be shut."

Thousands of other examples could be cited. The Rule of Law is invoked whenever we criticize governments that are trying to get their way by arbitrary and oppressive action or by short-circuiting the procedures laid down in a country's laws or constitution. Interfering with the courts, jailing someone without legal justification, detaining people without due process, manipulating the constitution for partisan advantage—all these actions are seen as abuses of the Rule of Law.

THE RULE OF LAW IS A MULTIFACETED ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or their own ideology.

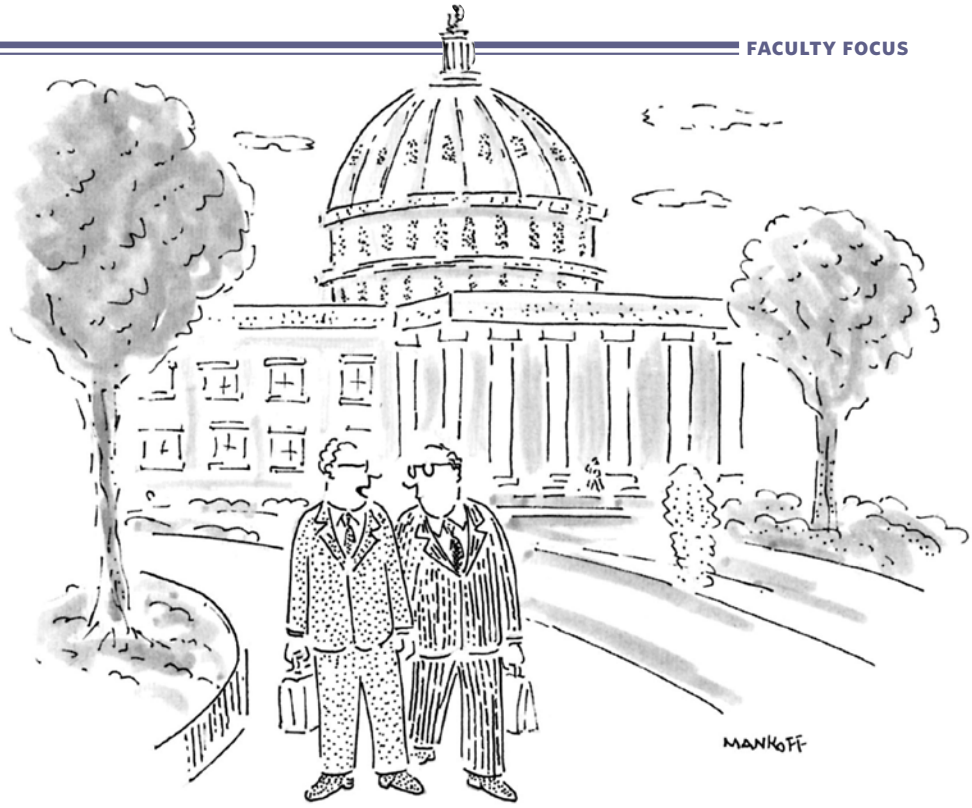
Beyond this, many conceptions of the Rule of Law place great emphasis on legal certainty, predictability, and settlement, on the reliable character of its administration by the state. Citizens—it is said—need predictability in the conduct of their lives and businesses. There may be no getting away from legal constraint in the circumstances of modern life, but freedom is served nevertheless if people know in advance how the law will operate and how they have to act if they are to avoid its having a detrimental impact on their affairs. As Friedrich Hayek argued in *The Constitution of Liberty*, knowing how the law will operate enables one to plan around its requirements. And knowing that one can count on its protecting certain personal property rights enables each citizen to know what he can rely on in his dealings with other people and the state. The Rule of Law is violated, on this account, when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens, or when officials act on the basis of their own discretion rather than rules laid down in advance. If actions of this sort become endemic, then not only are people's expectations disappointed, but increasingly they will find themselves unable to form any expectations at all, and the horizons of their planning and their economic activity will shrink accordingly.

A conception of the Rule of Law like the one I have just outlined emphasizes the virtues that Lon Fuller talked about in his 1964 book *The Morality of Law*: the prominence of general norms as a basis of governance; the clarity, publicity, stability, consistency, and prospectivity of those norms; and congruence between laws on the books and the way in which public order is actually administered. On Fuller's account the Rule of Law does not require anything substantive: For example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly way, giving us plenty of advance notice by publicizing the general rules on which its actions will be based and not arbitrarily departing from those rules even when it seems politically advantageous to do so. Requirements of this sort are described sometimes as procedural, but I think that is a misdescription. They are formal and structural in their character: They emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based.

There is, however, a separate current of thought in the Rule-of-Law tradition that does emphasize procedural issues. The Rule of Law is not just about general rules; it is about their impartial administration. A procedural understanding of the Rule of Law does not just require that officials apply the rules as they are set out; it requires that they apply them with all the care and attention to fairness that are signaled by ideals such as "natural justice" and "procedural due process." So, for example, if someone is accused of violating the rules, they should have an opportunity to request a hearing, make an argument, and confront the evidence against them before any sanction is applied. The Rule of Law is violated when the institutions that are supposed to embody these procedural safeguards are undermined or interfered with. In this way the Rule of Law has become associated with political ideals such as the separation of powers and the independence of the judiciary.

For the most part, these two currents of thought sit comfortably together. They complement each other: It is no good having clear general public norms if they are not properly administered, and it is no good having fair procedures if the rules keep changing or if, eventually, they are ignored. But there are aspects of the Rule of Law's procedural side that are in tension with the ideal of formal predictability. The procedural side of the Rule of Law requires public institutions to sponsor and facilitate formal argumentation in public settings. But argument can be unsettling, and the procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal. By emphasizing the legal process rather than the determinate norms that are supposed to emerge from that process, the procedural aspect of the Rule of Law seems to place a premium on values that are somewhat different from those emphasized in the formalist picture. Instead of the certainty that makes private freedom possible, the procedural aspects of the Rule of Law seem to value opportunities for people to demonstrate that the rules are not quite what we thought, or that they do not apply to certain situations in the straightforward manner we might have imagined.

If you were to ask which current of thought is more influential in legal philosophy, most scholars would say it is the first one, organized around the determinacy of legal norms. But it is striking that in the popular examples I gave at the beginning of this essay, the second current tends to be emphasized. When people say that the Rule of Law is threatened on the streets of Islamabad or in the cages at Guantánamo, it is the procedural elements they have in mind much more than clarity, prospectivity, and determinacy. They are worried about the independence of the Pakistani courts and about the due process rights of detainees in the war on terror.



"But how do you know for sure you've got power unless you abuse it?"

BY PICKING UP ON THIS PROCEDURAL AND institutional element, the popular perception is sensitive to an aspect of law that legal philosophers often neglect, but which needs to be understood as a key aspect of the concern for human dignity in our system of government. Laws are not just norms that are issued, identified, and enforced. They are administered through courts, which are institutions of a particular kind. They settle disputes about the application of norms through the medium of hearings, i.e., formal events that are tightly structured procedurally so an impartial authority can determine the legal rights and responsibilities of particular parties fairly and effectively after hearing evidence and argument from both sides.

True, in general jurisprudence (the study of law as such), our concept of a court and a hearing is necessarily rather abstract. But it is not just the concept of a law-enforcement agency. It would be quite wrong, even in general jurisprudence, to abstract from the elements of process, presentation, formality, impartiality, and argument. These ideas embody a deep and important sense associated foundationally with the idea of

a legal system, that law is a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of the norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. None of this is present in the dominant positivist jurisprudence; all of it, I submit, should be regarded as an essential aspect of our working conception of law.

IT IS ALSO, I THINK, A DEFINING CHARACteristic of law that the arguments that law frames and facilitates are often reflexive in character, i.e., arguments about law itself. Let me explain.

Law presents itself to its subjects as something that one can make sense of. I do not just mean that one can make sense of each measure, as one might do on the basis of a statement of legislative purpose. I mean that one can try to make sense of the "big picture," understanding how the regulation of one set of activities relates rationally to the regulation of another. The norms that are administered in our courts may seem like just one damned command after another, but in fact they convey an aspiration to systematicity. Though legislation and precedents add to law in a piecemeal way, lawyers and judges characteristically try to see the law as a whole; they try to see some sort of coherence or system, integrating particular items into a structure that makes intellectual sense. This is the stuff of codification and Restatements, but it is also a resource for ordinary parties. People, when confronted with law's particular demands, can take advantage of this aspiration to systematicity in framing their own arguments—by inviting the tribunal to see how the position they are putting forward fits generally into a certain conception of the logic and spirit of the law.

In this way, law pays respect to the people who live under it, conceiving them as bearers of individual reason and intelligence. Once again, the theme of dignity is important. The law treats the individuals whose lives it governs as thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state.

The price of this respect, however, is a certain diminution in law's certainty. Occasionally an argument will be made, by counsel or by a judge, to the effect that the impact of the law on a particular type of event or transaction should be treated as embodied in some proposition, even though that proposition has not been explicitly adopted in legislative form or explicitly articulated (until this moment) by a court. The claim may be that since the proposition can be inferred, argumentatively, from the mass of existing legal materials, it, too, should be accorded the authority of law. It is a characteristic feature of legal systems that they set up institutions—courts—that are required to listen to submissions along these lines. They are not just arguments about what the law ought to be—made, as it were, in a sort of lobbying mode. They are arguments of reason presenting competing accounts of what the law is. Inevitably, of course, the arguments are controversial: One party will say that such-and-such a proposition cannot be inferred from the law as it *is*; the other party will respond that it *can* be so inferred if only we credit the law with more coherence than people have tended to credit it with in the past. And so the determination of whether such a proposition has legal authority may often be a matter of contestation.

When people say that the Rule of Law is threatened in Islamabad or at Guantánamo, it is the procedural elements they have in mind much more than clarity, prospectivity, and determinacy.

I HAVE SAID THAT MOST SCHOLARLY conceptions of the Rule of Law emphasize the importance of determinacy and settlement. For them, the essence of the Rule of Law is people knowing exactly where they stand. Accordingly, they highlight the role of rules rather than standards, literal meanings rather than systemic inferences, direct applications rather than arguments, and ex ante clarity rather than labored interpretation. Conceptions of this kind are very popular, and it is natural to think that the Rule of Law must condemn the uncertainty that arises out of law's argumentative character.

However, no analytic theory of what law is and what distinguishes legal systems from other systems of governance can afford to ignore the procedural and argumentative aspect of our legal practice. The fallacy of modern positivism, it seems to me, is its exclusive emphasis on the command-and-control aspect of law, without any essential reference to the culture of argument that it frames, sponsors, and institutionalizes. The institutionalized recognition of a distinctive set of norms may be an important feature. But at least as important is what we do in law with the norms that we identify. We don't just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a continual process of argument back and forth, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us.

In positivist jurisprudence, argumentative indeterminacy is treated as an occasional aberration, arising when the open texture of language collides unfortunately with the unforeseen character of certain "hard cases." And when this indeterminacy crops up, the idea is that we should put an end to it as quickly as possible—if necessary, by empowering the judge to settle the law in some quasi-legislative manner. But as Ronald Dworkin argues in *Law's Empire*, any such account radically underestimates the point that argumentation (about what this or that provision means, or what the effect is of this or that array of precedents) is business as usual in law.

Equally, I don't think that a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on government's treating ordinary citizens with respect as active centers of intelligence. The traditional demand for clarity and predictability is made in the name of individual freedom—the freedom of the Hayekian individual in charge of his own destiny, who needs to know where he stands. But with the best will in the world, and the most determinate-seeming law, circumstances and interactions can be

treacherous. From time to time, the Hayekian individual will find himself charged or accused of some delict or violation, or his business will be subject—as he sees it, unjustly or irregularly—to some detrimental rule. Some such cases may be clear, but others may be matters of dispute.

It seems to me that an individual who values his freedom enough to demand the sort of calculability that the Hayekian image of freedom under law is supposed to cater to, is not someone whom we can imagine always tamely accepting a charge or a determination that he has done something wrong. He will have a point of view on the matter, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. When he brings his point of view to bear, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins: legal argumentation and the facilities that law's procedures make for the formal airing of these arguments.

Courts, hearings and arguments—those aspects of law are not optional extras; they are integral parts of how law works, and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to slice in half, to truncate, what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence. □

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Good Reads

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$750 Billion Misspent? Getting More from Tax Incentives

BY LILY L. BATCHELDER, AUSTIN NICHOLS, AND ERIC TODER
Urban Institute Press, forthcoming, 2009

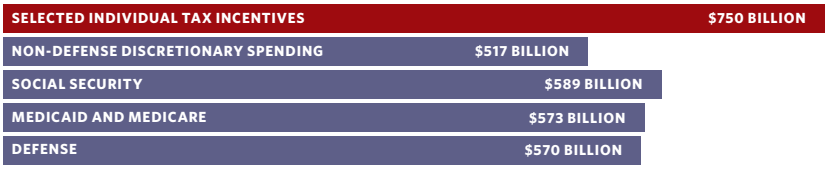
"The U.S. federal government spent about $750 billion on income tax breaks for certain individual behavior in 2007—more than the cost of all domestic discretionary spending. This means that we vastly misconceive of the size of government when we ignore these tax provisions.

The federal income tax is a powerful vehicle to enact and administer social policy. But only certain kinds of tax incentives make sense. Many existing incentives are inferior to regulation, direct spending, or 'nudges.' When tax incentives are a good idea, a refundable credit is almost always the most cost-effective way of promoting social goals. But very few are structured in this way.

This book offers a framework for when and how we should offer tax incentives, and applies it to six major areas: work by low-income parents, higher education, homeownership, charitable contributions, retirement saving, and health insurance. In doing so, it offers suggestions for how to redesign these tax incentives so that they are more cost-effective—and which ones we should scrap.

In the coming years, we face deficits of unprecedented proportions. We cannot rely solely on new taxes and raising marginal rates. We need to consider whether the government we have is focused in the right places, including both the direct subsidies that we count as government spending, and the tax incentives that we do not."

FEDERAL DIRECT SPENDING V. INDIVIDUAL TAX INCENTIVES, 2007



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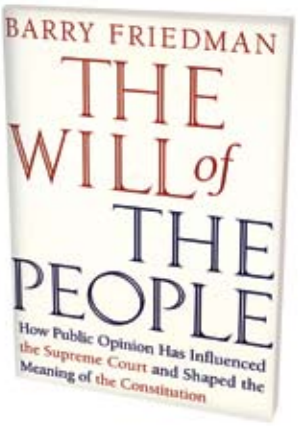
The Will of the People

BY BARRY FRIEDMAN
Farrar, Straus & Giroux, 2009



"The Court will get ahead of the American people on some issues, like the death penalty, or perhaps school desegregation itself. On others, such as gay rights, it will lag behind. But over time, with what is admittedly great public discussion, but little in the way of serious overt attacks on judicial power, the Court and the public will come into basic alliance with one another.

In the course of acting thus the Supreme Court has made itself one of the most popular institutions in American democracy. The Justices regularly outpoll the Congress and often even the President in terms of public support or confidence.

When the Supreme Court decided the contested presidential election of 2000 in *Bush v. Gore*, many saw this as a low point for the Justices. Yet, prior to the decision over 60 percent of the country said it was the Court's job to resolve the matter—compared to only 17 percent for Congress! And within a year of the decision in *Bush v. Gore* the Court again was running at high levels of support among Republicans and Democrats alike.

These facts profoundly call into question the image of the Supreme Court as an institution that runs contrary to the popular will. In the modern era the supposed tension between popular opinion and judicial review seems to have evaporated....

The ultimate question, of course, is whether this is a good thing....

The short answer...rests in distinguishing the passing fancy of the American people from their considered judgment. Judicial review would indeed be a puzzling addition to the American system of government if all the Supreme Court did was mirror transient public opinion. The value of judicial review in the modern era is that it does something more than that. It serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them. It forces the American people to work to reach answers to these questions, to find solutions—often compromises—that obtain broad and lasting support. And it is only when the people have done so that the Court tends to come into line with public opinion.

This, then, is the function of judicial review in the modern era: to serve as a catalyst, to force public debate, and ultimately to ratify the American people's own views about the meaning of their Constitution."

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Human Rights Advocacy Stories

EDITED BY MARGARET L. SATTERTHWAITE AND DEENA R. HURWITZ WITH DOUG FORD
Foundation Press, 2009

"On the second night of his imprisonment in Afghanistan, Khaled El-Masri was interrogated by four masked men. One of the men asked him if he knew where he was. He replied, 'Yes, I know, I'm in Kabul.' The man then replied, 'It's a country without laws. And nobody knows that you are here. Do you know what that means?'...

As much as any area of the law, human rights involves narratives—the stories of individuals, groups, and movements of people—who engage in different ways with strategies, institutions, and legal frameworks that we refer to as international human rights. But perhaps more than many other fields of law, human rights norms and standards develop as much through individual and collective vision and action in the world as through cases before courts and tribunals. By making real the stories of collective action behind human rights advocacy, developing norms, and enforcement mechanisms, *Human Rights Advocacy Stories* illustrates the dynamic interactions between advocacy and legal doctrine.

The chapters in this volume tell the stories of individuals and groups whose bodies, minds, lives, identities, communities, and cultures are threatened at the hands of governments, corporations, armed groups, or communities. They are the stories of people who are brave, desperate, determined, or just angry enough to stand up against those abuses."

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Student Spotlight

Schoolchildren in Kumba, Cameroon, surround David Kienzler '10 after performing a song thanking him for his work in their community. The Public Interest Law Center funded Kienzler's 1L summer human rights internship at the Global Conscience Initiative. Read about his compelling experience on page 85.

Lauding an Illustrious Career from the Factory to the Bench

Annual Survey is dedicated to the Honorable Patricia Wald.

In the summer of 1948, before entering Yale Law School with the intent of becoming a labor attorney, Patricia McGowan hit the bricks with her uncle and grandfather—in picket-line solidarity with a United Auto Workers strike—at a ball bearing factory in gritty Torrington, Connecticut, where she worked as a "greaser."

This was before McGowan earned her J.D., married lawyer Robert Wald, and, much to the consternation of religious conservatives in Congress who labeled her an "instrument of the Devil," became the Honorable Patricia M. Wald—and now former chief judge of the U.S. Court of Appeals for the District of Columbia Circuit; former associate judge for the International Criminal Tribunal for the Former Yugoslavia; mother of five, grandmother of 10; and, in frigid Iowa during the presidential caucus season, a heavily bundled, 79-year-old canvasser schlepping door-to-door in the cause of Barack Obama.

For her numerous accomplishments, as well as persistent good humor, student editors dedicated the 2009 *Annual Survey*

of American Law to Judge Wald. She was lauded by fellow D.C. Circuit judge Harry T. Edwards, professors and former clerks Cynthia Estlund and Nancy Morawetz '81, and former colleagues Kelly Askin, senior legal officer at the Open Society Justice Initiative, and David Tolbert, senior fellow at the Jennings Randolph Fellowship Program of the United States Institute of Peace. All spoke of light-hearted and even comic moments that leavened what they called an "inspired and inspiring" career.

Judge Edwards recollected circuit bench conferences when "you always want to hear what Judge Wald has to say because she clears your head and improves your understanding, and maybe she'll be funny as well." Estlund, Catherine A. Rein Professor of Law, praised Wald for her "refusal to lose sight of the concerns of ordinary people" who are affected by broad theories of law settled in appellate decisions. And Morawetz, professor of clinical law, cited her mentor as a "role model for women clerks," on and off the judicial clock.

"One night, we all went to a bar and taught her to play *Pac-Man*," Morawetz disclosed. "The judge went incognito—as 'Marge.'"

In an interview prior to the ceremony, Wald remembered that summer of '48, and the woman she holds responsible for her success—her mother, Margaret O'Keefe McGowan, who, when her husband disappeared during the Great Depression, raised their child alone, determined that a girl could go far from the mill town of her birth.

Indeed, following a postgraduation clerkship in New York, she wound up in Washington, D.C., due to her husband's U.S. Navy assignment. The federal government was "in the throes of loyalty hearings" that year, Wald explained. Accordingly, she dropped labor law to sign on at a firm that defended victims of Senator Joseph McCarthy, the notorious red-baiter and blacklist bully. The firm was, she said, "a more appropriate place to work" in 1952.

She left practice to raise her children. When, in the 1960s, Wald returned to law as a female lawyer 10 years out of the game, the available opportunities led her into part-time criminal justice work, which included children's rights—a pursuit that later prompted opposition from religious zealots during congressional hearings on her appointment to the D.C. Circuit by President Jimmy Carter. "The stance of some evangelical and conservative groups was that families should make all important decisions about the child," Wald explained, adding that lawyers like her, bent on children's health and drug education, "constituted an unjustified intrusion into the sanctity of family life."

To be accused of complicity with Lucifer in congressional hearings, said Wald during her short thank-you address, was "particularly galling since my five kids had to sit stoically through the entire harangue."

Afterward, however, a reporter asked one of her sons for his reaction. The son made his mother proud by saying, "Well, she burns the lamb chops, but otherwise she's O.K." □ *Thomas Adcock*

Watching from the Wings

While many students were in class on March 30, Jacob Karabell '09 was at the U.S. Supreme Court watching Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, deliver an oral argument that Karabell helped him prepare in *Travelers Indemnity v. Bailey* and the consolidated case *Common Law Settlement Counsel v. Bailey*.

The case involves the long-running asbestos litigation. After Travelers and other insurers contributed to a $2.8 billion settlement fund in exchange for immunity from the bankruptcy court from future claims, plaintiffs' lawyers found other grounds to sue. Following mediation, Travelers then funded a $500 million trust in return for clarification that it would be immune from future claims. Plaintiffs not part of the new settlement objected, and the U.S. Court of Appeals for the Second Circuit agreed, finding that the bankruptcy court did not have the power to immunize Travelers from other claims. The Supreme Court granted review.

Karabell, now an associate at Covington & Burling in Washington, D.C., began assisting Issacharoff, who represents the plaintiffs against Travelers, in January. He reviewed Supreme Court and circuit case law, legislative history, and scholarship. Students from the Supreme Court Litigation Clinic also assisted with the brief, and that clinic and its director, Samuel Estreicher, Dwight D. Opperman Professor of Law, were co-counsel on the brief.

Once the brief was submitted, Karabell helped Issacharoff prepare for oral argument by researching potential questions from the bench. Justice Souter asked whether subject-matter jurisdiction ever can be challenged collaterally if it is not contested in the first proceeding. Issacharoff relied on Karabell's research to answer that the Court had never squarely addressed the issue. "I had run through the argument a million times in my head. As a result, it was fascinating to watch everything unfold several rows in front of me."

A Moot Court of the Highest Order

Justice Samuel Alito presides over the 37th Annual Marden Competition.

NOTHING GIVES A MOCK SUPREME Court hearing a frisson of verisimilitude like the presence of an actual Supreme Court justice. On April 8, a standing-room-only crowd witnessed Justice Samuel A. Alito Jr. and U.S. Court of Appeals judges Michael W. McConnell of the Tenth Circuit and Diana Gribbon Motz of the Fourth Circuit presiding over the 37th annual Orison S. Marden Moot Court Competition.

In the fictitious case *Veruca Salt v. United States*, created by Roxana Labatt '10 and Kate Corbett Malloy '10, the petitioner appealed her conviction for attempting to smuggle piñatas filled with oxycodone into the country. She argued that the government had violated her Fifth Amendment rights by introducing as evidence of guilt Salt's silence prior to her arrest and the reading of her Miranda rights. She also asserted that the Constitution's ex post facto clause had been violated when the district court judge looked to a newer version of the federal sentencing guidelines that recommended a longer sentence, rather than the guidelines in place at the time of Salt's offense.

Motz, Alito, and McConnell

These were thorny questions that, as McConnell pointed out, were "pitched at pressure points within the Supreme Court's jurisprudence." Both the petitioner's counsel, Daniel Weinstein '09 and Vikram Kumar '10, and the respondent's counsel, Matthew Lafargue '10 and Beth George '10, faced a barrage of challenging queries from the panel of judges.

Kumar tackled the question of the sentencing guidelines for the defense. Pointing out that a district court can impose a sentence of its choosing, Alito asked, "Why does it make a difference whether the judge imposes an above-guidelines sentence based on new information that is contained in an amendment to the guidelines that is inapplicable to this case, as opposed to similar information that is brought to the judge's attention in any other form—in a law review article, in a newspaper editorial, on a TV show?" Kumar answered, "Because the guidelines serve as the initial benchmark as per this court's holding in [*Calder v. Bull*], and when that benchmark moves in a way that disadvantages a defendant, a significant risk of harsher punishment is created, and the ex post facto clause is violated."


Lafargue

On the government's side, Lafargue made a forceful argument that Salt's Miranda rights were not triggered prior to her being taken into custody. "I'm not sure that this doesn't undermine Miranda altogether," Motz said. "If we should hold your way here, don't we encourage police officers to just keep defendants in their car over by the side of the road until they do say something incriminating, or, if they keep silent, we use that against them, too?" Lafargue answered, "The petitioner's concern about the delay of Miranda warnings is unfounded, simply because the right doesn't trigger at the point at which Miranda is actually read; the right triggers at the point at which Miranda *should* have been read."

After a brief deliberation, the judges named Lafargue as Best Oralist. But Alito gave high praise to each of the counsel for their preparation and poise: "We were harder on you than we generally are on lawyers who appear before us in regular cases. We wanted to give you a workout, and I think we did. I can't tell you how many arguments that I delivered as a lawyer when I staggered out of the courtroom after the performance. None of you should feel that way." □ *Atticus Gannaway*

ARGUING THE FINER POINTS OF IMMIGRATION LAW The fourth Immigration Law Moot Court Competition, organized by co-editors Laura Ginsberg Abelson '09 and Allison Wesley '09 and Moot Court Board Chairperson Melissa Gerecci '09, welcomed teams from 13 law schools last February. U.S. Court of Appeals judges D. Brooks Smith for the Third Circuit and Carlos Lucero for the Tenth Circuit and Judge John Gleeson of the U.S. District Court for the Eastern District of New York presided over the final arguments, declaring Georgetown University Law Center the winner over Brooklyn Law School.

The Fruits of His Labors

Fritzsche wins Pro Bono Publico and Skadden Fellowship.

With his face hidden behind a mop of curly hair, a beard, and a pair of wire-rim glasses, Thomas Fritzsche '09 shies away from talking about himself. But once the topic shifts to immigrant and labor advocacy, the words spill out in torrents. For the past eight years, Fritzsche has worked zealously on behalf of migrant and immigrant workers. Last year he was awarded the Pro Bono Publico by the Public Service Law Network, and he is now a Skadden Fellow working for the Southern Poverty Law Center's Immigrant Justice Project.

Fritzsche discovered the issue that would become his passion almost by accident. "I was just looking for a summer job that involved social justice and that would allow me to practice my Spanish," he said. So the summer after his sophomore year at Amherst College he returned to his native Maine to intern at the Maine Department of Labor's Division of Migrant and Immigrant Services. The experience so intrigued him that he continued to pursue internships and jobs for organizations including the Maine Migrant Health Program, the Service Employees International Union, and the National Day Laborer Organizing Network.

Going a step beyond his job requirements, Fritzsche has experienced firsthand the life of a migrant farmer. He took a leave of absence from his job as an organizer with SEIU in 2005 to join two migrant farm crews, spending more than three months picking apples and blueberries. He gained tremendous insight. "Growers often falsify the number of hours that you worked so that it looks like you were paid the minimum wage," he said, adding that protesting to supervisors was difficult. And he now has a clearer grasp of how workers understand their rights and how these rights are enforced. In 2007, Fritzsche was contacted by the Coalition of Immokalee Workers, which has pioneered farmworker rights by persuading large-volume tomato purchasers to make direct payments to pickers to improve their wages. The coalition wanted his help to create an organization to help it gain allies among consumers and organizations promoting organic, sustainable, and locally grown food. In 2008 he achieved this goal, co-founding Just Harvest from Field to Fork. It was this endeavor, supported by letters from two dozen students and faculty, that won over the Public Service Law Network award committee.

With a full-tuition scholarship from the Bickel & Brewer Latino Institute for Human Rights, Fritzsche has oriented his studies at NYU Law toward immigrant rights. Through the Immigrant Rights Clinic taught by Professor Nancy Morawetz '81, he has co-written appellate briefs, conducted depositions, and represented a worker in federal district court litigation against his former employer. "Tom is full of initiative," raved Professor Cristina Rodríguez, faculty director of the Bickel & Brewer scholars program. "His seriousness of purpose and his generosity as a human being are an inspiration to everyone he encounters." □

Coif Honors Public Servant

Upon his honorary induction into the Order of the Coif, former U.S. Congressman Frank Guarini '50 (LL.M. '55) spoke to the student inductees who are in the top 10 percent of their class and will graduate magna cum laude. He stressed the importance of determination and diversity: "I had a curiosity to see the world," he said. "I was able to learn from everybody who came from a different culture."

Guarini is a World War II veteran of the U.S. Navy who has had an illustrious four-decade-long career in public service. He was elected to the New Jersey State Senate in 1965. Starting in 1979, Guarini served seven consecutive terms in the U.S. House of Representatives, representing the now defunct Fourteenth Congressional District in New Jersey, where he sponsored the state's first air and water pollution regulations. Recently, the Frank J. Guarini Center for Environmental and Land Use Law was named for him. From 1994 to 1996 he was the U.S. Representative in the United Nations General Assembly, appointed by President Clinton. □

New Fellowships

Meet two inaugural fellows co-sponsored by NYU Law and prestigious employers:

Sonia Lin '08

Outten & Golden Fellow

A Root-Tilden-Kern Scholar, Lin helped draft a petition to the Department of Homeland Security to promulgate immigrant detention regulations while a student in the Immigrant Rights Clinic. Last year, she clerked for Judge Denny Chin of the Southern District of New York.

Outten & Golden, a plaintiff-side employment law firm, introduced this one-year fellowship in collaboration with the Public Interest Law Center to provide a recent alumnus with hands-on experience in employment and labor matters.

Suzanna Publicker '09

NYU-NYPD Fellow

The executive editor of the *Journal of Legislation and Public Policy*, Publicker held clinical internships in the Medical-Legal Advocacy Clinic and the Prosecution Clinic in the Southern District of New York. She worked for the New York Police Department in 2007 and for the Special Federal Litigation Unit of the New York City Law Department last summer.

She will work at the NYPD under the supervision of the deputy commissioner for legal matters and also with officials in the Intelligence Division, Counterterrorism Bureau, Detective Division, Organized Crime Control Division, and other units. The one-year fellowship carries a stipend of $75,000 and guaranteed placement in the Special Federal Litigation Unit of the New York City Law Department. The fellowship is funded by a grant from the Police Foundation.

"There are few institutions that have been more vital and successful in preserving the well-being and security of New Yorkers than the NYPD, especially in the post-9/11 era," said Dean Richard Revesz. "We are pleased to partner with the NYPD on this initiative, enabling some of our most talented lawyers to serve this important public institution."

Cameroon or Bust

David Kienzler '10 arrived in an African backwater as a summer intern and left as chief of Kwa-Kwa.

COUNCIL'S COUNSEL Kienzler and other interns of the Global Conscience Initiative meet with the village council of Barombi Mbo to prepare for conflict mediation training. Below, Kienzler is next to Elvis Tawe, a Cameroonian science teacher and GCI volunteer.

I ADMIT I WONDERED IF SPENDING my 1L summer in Cameroon was really such a good idea. Most of my friends were eagerly anticipating a summer of high wages and ridiculous perks without ever having to leave the city. But looking back on it, I think I won. I ended the summer of 2008 crowned the Honorable Chief Dave of Kwa-Kwa; all they got were some free Yankees tickets.

Cameroon has twice topped Transparency International's list of the most corrupt governments, and the backwater village of Kumba is infamous even in Cameroon as the place officials go if they want a Mercedes. I interned at Global Conscience Initiative, a tiny domestic human rights nongovernmental organization in Kumba. I spent the summer in an office that lacked running water, consistent electricity, and Internet access, dealing with everything from fighting for prisoner's rights and bail petitions to the day-to-day problems of people suffering under Cameroon's extremely corrupt ruling regime. Additionally we coordinated efforts between NGOs and local barristers, started a human rights radio hour, and argued (futilely, in general) with all manner of government officials.

I'd be lying if I said I, or any of the other handful of internationals, achieved any substantial successes in our legal battles. But whether our bail appeals and rights conferences made a difference with the government, our presence had an impact on the local people. Everyone I met was amazing—just hardworking and intelligent and friendly. They seemed to be inspired by the fact that someone from America cared enough to come help out. And since "Whiteman" is still a pretty big novelty there, I was a major celebrity. I got a taste of what life must be like all the time for Brad Pitt. People I didn't know always wanted to talk or share "a bottle." I was a guest of honor at a wedding, a funeral celebration, and a baby shower, despite the fact that I hadn't met the hosts till I arrived. I was kind of uncomfortable at first—I mean, all I'd really done was to be American—but it seemed to genuinely matter that I was there trying to help, so I threw myself into it and the community loved it even more.

Pretty soon I was eating porcupine and fried termites in a three-sided shack that functioned as the local bar, huddled around a candle listening to the Euro Cup Final. (The whole town's power was out. Again.) Or I was showing off my sweet dance moves. Inexplicably, the townspeople found this hysterical.

At work it was almost impossible to come and go without having to stop and play with the local kids who hung out around the office. We'd run around; they'd beat me up. It was a nice change of pace after being yelled at by the chief state prosecutor for meddling in his allegedly corrupt affairs, and a heck of a lot better than doc review. At the end of the summer they even performed a song about Chief Dave and GCI as a thank-you for all our work.

So. The whole chief thing. Partway through the summer, GCI did workshops on conflict mediation for the councils of a number of surrounding villages. During a mock workshop in the office I was cast as a chief and I played it up. I chose Kwa-Kwa because frankly, it had the coolest name, and I spent all day in character, demanding to be referred to as Chief. My native coworkers couldn't stop laughing, so the title stuck. And being in a small town, pretty soon I couldn't walk down the street without people calling out, "Chief of Kwa-Kwa!" Eventually the village council of Kwa-Kwa came in for its training and (much to my relief) found it hilarious too. So as part of the big GCI festivity celebrating the end of the interns' time there, I was officially crowned the Honorable Chief of Kwa-Kwa. I even got a chief's hat! They walked me through the ceremony, explaining the significance of each part, and then enumerated my powers and duties. If anyone touches my hat they have to give me a goat, which is pretty sweet. On the other hand, I now also need to get 15 wives, which might be tricky given my current level of debt and inability to get a date.

I have been assured that my position is being maintained till I return. I confess it has not been easy readjusting to a world where I am not celebrated; attempts to get my classmates to call me Chief have not met with much success. But I guess there's always my 2L summer, which I'll be spending in South Africa. Cape Town, here I come! □

Kick-Starting Student Life

Faculty, alumni, and 2Ls introduce the Law School, the Village, and the city to the incoming class of 2011.

As Roderick Hills, William T. Comfort III Professor of Law, revved up for a mock class analyzing the 2005 case *Kelo v. City of New London*, incoming law student Giulia Previti '11 quietly confessed she was excited but apprehensive about the coming year. "You don't know how the classes will work and what to expect," she said.

It was Day Three of orientation for the Class of 2011. Roaming the stage of Vanderbilt Hall, Hills was energetically demonstrating the Socratic method of teaching as he and six 2Ls dissected the definition of "eminent domain" and how it could be applied. "If people don't ask questions, I will call on them," he warned. Then, turning to one student, he rapped out, "What's wrong with this argument, Ms. Goldman? You have 30 seconds."

If the prospect of undergoing Professor Hills's catechism at first seemed terrifying to Previti and her 447 fellow first-year students, most said his obvious goodwill and sense of humor left them reassured. "He showed that you need to be prepared but he will help you along," said Josh Levy '11. Vice Dean Barry Friedman couldn't be more pleased with this answer. The architect of J.D. orientation, he deliberately ditched the traditional combination of speeches and social events for a more dynamic, heuristic model. "We decided to focus on a very substantive orientation that acquaints students with what is going to happen when they hit the classroom," said Friedman.

This year's orientation was built around *Kelo*, chosen because the case touches on many first-year curriculum teaching points and is recent enough that students may remember its newspaper headlines. (The case involves a lawsuit by Susette Kelo, whose New London, Connecticut, home was condemned to be razed for an office park under the right of eminent domain.) "We take the case almost from cradle to grave to illustrate some of the stages that law students would experience," explained Friedman. "We tried to give them a chance to see it from a lot of different perspectives, to be consistent with NYU's advantages and uniqueness."

The previous day of orientation had introduced students to *Kelo* through a moot court. Dennis Jacobs '73, chief judge of the U.S. Court of Appeals for the Second Circuit, and Barbara S. Jones and Victor Marrero, both U.S. District Court judges for the Southern District of New York, heard the arguments. Richard Epstein, James Parker Hall Distinguished Service Professor of Law at the University of Chicago, who in 2010 will join the faculty of NYU Law, presented an impassioned plea for the petitioner, calling New London's development plan "a giant intellectual and planning fiasco." Jane Gordon, New York City's senior counsel in the Office of the Corporation Counsel, vigorously argued that economic development is a public purpose and therefore the Fifth Amendment clause on public use—"...nor shall private property be taken for public use without just compensation"—applied.

An actual verdict wasn't rendered, since the three judges may hear eminent domain cases in the course of their real-life judicial duties, but they did share their general thoughts. Jacobs discussed the difficulties of deciding cases based on conflicting values, as well as the importance of sidestepping compelling but essentially extraneous material in order to focus on the key elements. Jones explained the differences between higher and lower courts, noting, for instance, that higher courts look at the broad principles of a case while lower courts concentrate on scrutinizing the minute facts.

The students had already had some hands-on experience in scrutinizing minute facts on the first day of orientation. The occasion was a scavenger hunt designed to

OUTWARD BOUND, IN DOWNTOWN MANHATTAN Students broke into teams to explore the city through a challenging urban scavenger hunt. Instead of collecting items, however, the teams had to complete a set of tasks and take photographic evidence of their accomplishments, such as getting behind the wheel of a cab.

LL.M. Orientation

Masters of the Universe This fall, the Law School welcomed 414 lawyers seeking LL.M. degrees, with another 54 matriculating at the NYU@NUS Singapore program. The Office of Graduate Affairs introduced them to life in the big city with a double-decker bus tour, sunset cruise around Manhattan, and later, a spring break trip to Washington, D.C. For academic grounding, LL.M. candidates took a mandatory, one-week Introduction to U.S. Law course taught by Mary Holland, Caren Myers Morrison, and Irene Ayers of the Graduate Legal Skills Program. The vast majority of LL.M. students are from civil law jurisdictions in Asia, Europe, and Latin America. As common law often applies in international contracts, an understanding of U.S. common law is an advantage for lawyers who work on international transactions. "If you have a degree from France, Argentina, or Kazakhstan, you may find it difficult to rise to the top in a global law firm," says Holland. "An LL.M. from NYU evens the playing field."

introduce them to Greenwich Village, the Law School's history, and their classmates, part of the orientation's goal of building esprit de corps. "The great thing about orientation is meeting people," said Previti. "Having a sense of community helps a lot in decreasing your apprehension."

There were plenty of people to meet. After moot court, students mingled with the judges, professors, and law school alumni in the elegant setting of Gotham Hall. Inviting alumni to participate in orientation was new this year but is something Friedman intends to repeat. "They're an outstanding resource that we can and should call on more," he said.

The orientation also showcased the depth and breadth of the Law School's faculty. Professor Hills's mock class was followed by a postmortem panel discussion with Law School faculty that demonstrated "how the law operates in many different dimensions," said Friedman. Professor Daniel Hulsebosch took a historical view of eminent domain clauses. Vicki Been '83, Boxer Family Professor of Law, who teaches classes on property law and is director of the Furman Center for Real Estate and Urban Policy, talked about how public policies affect private neighborhoods and communities in very real and profound ways. Burt Neuborne, Inez Milholland Professor of Civil Liberties and an active litigator, examined *Kelo* from a practitioner's perspective. "Something that often gets lost in the intellectual feast that is law school is our social role," he noted. "We're supposed to be advisers and tell our clients what they should do to bring their affairs into legal concordance."

As everyone drifted off to pick up their box lunches and picnic with their section's faculty, the mood among the first-year students was considerably more relaxed than it had been the day before. So far, students noted, NYU was living up to its reputation for being collegial and collaborative. "The professors don't have that *Paper Chase* attitude of drilling you into submission," said Eric McLaughlin '11. "People seem more cooperative and less cutthroat than other places. There's a sense that everyone wants to work hard but isn't obsessed."

If there's one lesson Friedman wanted students to take away from orientation, it's precisely that: "There are tough schools and friendly schools. We're both really tough and really friendly." Orientation, he added, should help students to start law school at NYU "comfortable in the classroom, familiar with people around them, and happy to be in New York City." □

Catherine Fredman

Life as a Law School Musical

THE NYU LAW REVUE, THE ANNUAL student-produced sendup of the Law School, celebrated its 35th anniversary last March with the 2009 installment, *NYU Law, 10012*. Parodying popular movies and TV shows with high-school themes, including *Beverly Hills, 90210*, *Gossip Girl*, *Clueless*, and *The Breakfast Club*, this year's show gave its participants ample opportunity to explore student angst and insecurities. *NYU Law, 10012*, which told the story of five 1Ls battling an evil plot by a heavily fictionalized Vice Dean Barry Friedman, featured a cast of 28 performing more than a dozen songs adapted from pop hits like "Footloose" and "Thriller."

The elaborate nature of this year's Law Revue was in stark contrast to the inaugural 1974 production, which was staged virtually singlehandedly by Elliot Polebaum '77 and adapted from the previous year's Harvard Law School Parody. The next year, Jeffrey L. Schwartz '76 wrote a wholly original full-length operetta, *Bye Bye Bobby, or The Law School Gets a New Dean*, influenced by the retirement of then-dean Robert McKay. The production, directed by Jeffrey Aker '76, featured future Metropolitan Opera tenor Peter Kazaras '77. In the early Law Revue shows, Schwartz recalled, professors played themselves more frequently than has been the case in recent years: "We tried to give the faculty an easy-to-sing 'chorus'-type song in each, which they of course butchered."

Another Law Revue alumnus, David Newman '84, fondly recalled his *Tootsie*-inspired drag number in the show *The Partners of Penzance*, as well as the many nocturnal rehearsals during his three years of involvement with NYU Law's theatrical institution: "They'd last until well into the night. Then a core group of us would head out for supper. Or was it breakfast? Either way, I felt a sense of camaraderie that has seldom been repeated." Those times, he said, were "some of the happiest moments that I've lived." □

A THREE-POINT RETORT Determined to avenge last year's blowout, the Violets pulled off a victory over Columbia at the eighth annual Deans' Cup. NYU held on to a narrow 56–53 victory, their fifth since the co-ed student charity games began. The Law School missed a sweep, however, as its uptown rival won the 10-minute halftime faculty game. The April event raised a cool $47,100, to be evenly split between the law schools. The Deans' Cup, the largest student-run law school event in the country, has raised more than $500,000 since 2002 to fund public interest summer internships and other programs at both schools.

Sold!

The 15th annual Public Interest Law Center Auction raised $90,000 in a challenging economy by featuring an eclectic array of items, including NASCAR Sprint Cup Series tickets (sold for $750) and a 1988 Jaguar XJS convertible (earning a tidy $6,000). Daniel Marx '10 bid $300 to challenge Dean Richard Revesz to a best-of-three match of Wii Tennis. While the dean lost, two games to one, NYU Law students won, as the event raised money to fund summer public service internships.

Symposia: From Page to Stage

Calabresi with *Survey* editor David Lawrence '09.

Tort Law in the Shadow of Preemption

Annual Survey of American Law

Many important questions regarding preemption and tort law are glossed over by courts that view the issues narrowly, said Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit in his keynote speech. Among them: Should decision-making be national and centralized, or local and diffuse? Are incentives preferable to regulations? Who sets minimum standards of behavior, and how?

Calabresi explored the nuances, weighing the positives and negatives. For instance, local decision making allows for the existence of opposing values within the same system, perhaps allowing the predominant set of values to win over time. However, this would lead to inconsistent valuation of many things, even of life itself. "We often act as if different values are not important. We have not had a national tort law in the United States, and that's interesting. In this sense the United States is much more divided in values than Europe is."

Yet in certain ways, centralized dictates concerning tort law might be detrimental: "If the government, at its highest levels, sets total standards, it says who is worth living and who is worth dying, what is worth doing to save lives and what is not, and that's a dangerous position to put the state in symbolically." The state, Calabresi said, can set minimum standards: "'You must do at least this much, but more should be done.'...Of course, the other side is that if you use an incentive system, you come mighty close to pricing lives."

With few clear directives from Congress, Calabresi said, "Shouldn't we at least ask how...these decisions can be better made? If Congress is no good at it, believe me, courts are lousy. State courts, elected as they are in most places? Federal courts, picked as we are? God help us....If we don't think seriously about this, then the whole nature of the society that we have all grown up in...will cease to be in ways which might surprise us, not just in torts but in the system as a whole."

The New Regulatory Climate: Greenhouse Gas Regulation in the Obama Administration

Environmental Law Journal
Environmental Law Society

The Regional Greenhouse Gas Initiative, operating in 10 states, is the only emissions cap-and-trade program currently functioning in the United States. As other regional groups plan for similar programs, the risk of "patchwork regulation" due to variations in regional and state regulations grows. One of the major roadblocks ahead for the Obama administration concerning emissions will be incorporating existing programs into new legislation.

New York Law School professor David Schoenbrod stressed that utility and energy groups must be involved in the process. He also explained that current conventional pollutant regulations in the Clean Air Act must be changed and related to greenhouse gas regulation, to create a system where caps for each are linked and ever decreasing as technology and efficiency improve.

The Normalizing of Adjudication in Complex International Governance Regimes

Journal of International Law and Politics

In his keynote address, Judge Bruno Simma of the International Court of Justice noted that 10 years ago the explosion of international courts and tribunals created a great deal of concern within the international academic community over the possibility of conflicting jurisprudence. Disunity of international judicial bodies might threaten the legitimacy of these international institutions, charged in some cases with the responsibility of prosecuting crimes of genocide and war crimes or adjudicating disputes between sovereign nations over state borders or the use of force. Judge Simma argued, however, that the present state of affairs in international law has not lead to conflicting jurisprudence among international courts and that, in fact, judges go to great lengths to avoid conflict and to engage in an international legal discourse.

Modernizing the Financial Regulatory Structure

Journal of Law & Business

Stuyvesant P. Comfort Professor of Law Geoffrey Miller asked two overarching questions of the financial crisis: "How did we get here?" and "Where are we going?" University of Texas School of Law professor Henry Hu pointed to changes in basic elements of financial system design, specifically the debt decoupling phenomenon that pits the economic interests of creditors against debtors. "Our debt governance paradigm assumes that shareholders and creditors hold bundled packages of rights and obligations," said Hu. "Financial innovation," namely securitization, "has rendered these foundational assumptions obsolete." Thomas Baxter, general counsel and executive vice president of the Federal Reserve Bank of New York, contended, however, that the minatiae of regulatory structure matter less than the quality of human regulators: "Far more important [than structure] are the people entrusted with supervision."

Of greatest concern to all is the popular cost of the regulatory response. "The war on regulation is over. The Fed has won," said Richard Kim, partner at Wachtell, Lipton, Rosen & Katz. "What we're seeing now is that these benefits are coming at a great price... [growing] worse each day."

The Unknown Justice Thomas

Journal of Law and Liberty

Supreme Court Justice Clarence Thomas has been on the court for 18 years, but his work remains underexamined. The journal editors invited former clerks to fill the void; they depicted a dogged, scholarly judge with firm humanitarian interests and strict constitutional loyalty. "It was our suspicion that Thomas's jurisprudence was richer and more nuanced than he has been given credit for by popular and legal commentators," said Daniel Meyler '09, the journal's editor-in-chief. "We hoped to... engender thoughtful response."

Professor Nicole Garnett of Notre Dame Law School tackled the perception that Thomas's opposition to affirmative action is elitist. Garnett insisted that Thomas knowingly distrusts and resents elite efforts to experiment with the disadvantaged."It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior," Garnett read from Thomas's *Missouri v. Jenkins* opinion. "This position appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites." □

Fall Ball

OCTOBER 29, 2008

Spring Fling

MARCH 11, 2009

Barristers' Ball

MAY 12, 2009

Natural Versus Human Rights

THE *NYU JOURNAL OF LAW & LIBERTY* held its fourth annual Friedrich von Hayek Lecture in Law. In "Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?," Judge Michael McConnell of the U.S. Court of Appeals for the 10th Circuit, an expert in constitutional history and law and religion, discussed how the language of the Ninth Amendment, which provides that the naming of certain rights in the Constitution does not take away from the people rights that are not named, can be understood only against the backdrop of philosopher John Locke's natural rights theory. McConnell said that Locke taught us that we all have natural rights, rights that human beings have in a state of nature before the creation of civil or political society.

But McConnell said that natural rights are not the same as human rights, those rights that must always and everywhere be respected by civil governments. On the contrary, because rights exist in a state of nature and are insecure, lacking a common means of impartial adjudication and enforcement, people enter into a social compact, such as the Constitution, in which they relinquish many of their natural rights in return for more secure protections of those that they retain. For example, McConnell said that according to Locke, we give up our natural right to use private violence to punish aggressors, thus giving the state a monopoly on the legitimate use of force for punishment.

McConnell said the Supreme Court has never defined what the Ninth Amendment means, but he offered a possibility: "That the rights retained by the people are indeed individual natural rights, but that they enjoy precisely the same status and are protected in the same way that they were before the Bill of Rights was added to the Constitution. They are not relinquished, denied, or disparaged, but neither do they become constitutional rights. They do not become trumps." □

A Post-Victory Reality Check

Despite Colombia's landmark 2006 decision to allow abortion under certain circumstances, women still face roadblocks to lawfully terminate their pregnancies. Monica Roa (LL.M. '03), who argued the Colombian constitutional case, described her fight to fully enforce the ruling and uphold women's rights at the 15th annual Rose Sheinberg Lecture.

"When we won, it was the beginning of a bigger struggle," said Roa, the program director of Women's Link Worldwide, a human and gender rights organization based in Madrid and Bogotá. According to Roa, pregnancies resulting from rape—grounds for legal abortion—can be particularly difficult for women to end easily: A number of polls have revealed that many Colombian medical professionals do not feel comfortable approving an abortion based on a woman's claim that a pregnancy was the result of a rape. A small percentage of the women who find themselves unable to obtain an abortion, despite meeting the legal criteria, end up in the courts when their appeals within the medical system are denied. This is of particular concern to Roa as a number of Colombian judges have refused to rule on these cases, citing their "conscientious objection" to abortion.

Roa described how her organization planned to file disciplinary complaints against judges who claim conscientious objection status when handling abortion cases. WLW is also helping to educate medical professionals about the importance of women's mental health and social welfare, another consideration for legal abortion in Colombia. WLW is working with experts in public health to devise a list of questions that could be used to diagnose a pregnancy's risk to a woman's physical and psychological well-being.

Despite her landmark legal victory, Roa urged caution before turning to the courts to make change happen. "You cannot take our solution as always go to the courts. That's not our lesson."

A Historic Trial Revisited

Instead of a speech, the 10th Annual Korematsu Lecture featured law students and members of the Asian American Bar Association of New York reenacting "The Trial of Minoru Yasui: The Administration of Justice in a Time of War." In 1942, Japanese American lawyer Yasui challenged a military-ordered 8:00 p.m. curfew imposed on all West Coast residents of Japanese descent.

Three months after Yasui intentionally broke the curfew, he appeared before Judge James Alger Fee in Portland, Oregon. Yasui argued that the curfew was unconstitutional because it applied to those of Japanese extraction regardless of citizenship but only to non-citizen residents of German and Italian origin. Indeed, Fee ruled that the curfew was unconstitutional when applied to American citizens, but then determined that Yasui had forfeited his citizenship because he had worked for the Japanese consulate—even though Yasui had resigned the day after Pearl Harbor. Fee handed down the maximum sentence: a $5,000 fine and one year in jail.

Yasui spent nine months in solitary confinement in a small, windowless cell until the U.S. Supreme Court reversed Fee's ruling. But it was a Pyrrhic victory: While the Court asserted that Yasui had not renounced his citizenship, it also stated that the curfew could be applied to citizens. Yasui was sent to Minidoka Relocation Center in Idaho until 1944. Four decades later his conviction was vacated by Oregon's federal district court.

Judge Denny Chin of the Southern District of New York, who presided over *United States v. Bernard L. Madoff*, was the principal author of the script used in the enactment. He said that "many of the issues in *Yasui* still reverberate today." In fact, *Korematsu v. United States*, the most notorious of the Japanese American internment cases, has never been overturned. Attorney Vincent Chang called *Korematsu* "part of a continuum of American history that spans from the Alien and Sedition Acts at the turn of the 19th century to Abraham Lincoln's suspension of habeas corpus during the Civil War, and now the Patriot Act and Guantánamo."

Judge Denny Chin

The Neglected Right of Assembly

TABATHA ABU EL-HAJ

Tabatha Abu El-Haj noticed something peculiar in the protests leading up to the 2003 invasion of Iraq; unlike protestors in other parts of the world, American activists readily accepted the limitations placed on them by state authorities. With few exceptions, police lines remained uncrossed and pre-approved march routes were scrupulously followed. Abu El-Haj wondered whether such restrictions on public assembly, and the public's willingness to tolerate them, were always a part of American society. Her research led to "The Neglected Right of Assembly," an article published in the February 2009 UCLA Law Review *that is extracted below.*

Abu El-Haj graduated Phi Beta Kappa and magna cum laude with a major in philosophy from Haverford College in 1994. She earned a joint J.D./Ph.D. in Law and Society in 2008 from New York University. Abu El-Haj also received an LL.M. from Georgetown University Law Center in June 2008. In 2005, she clerked for Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit. She is Assistant Professor of Law at Drexel University Earle Mack School of Law, and studies the overlap between law and political practice, especially in areas where politics extend beyond the purely electoral realm. As this paper documents, the American experience of politics evolves over time, and Abu El-Haj looks to shed light on the causes behind and the effects of these changes.

THE '08 ELECTION HAS PROVED a high-water mark for democratic politics. For the first time in the nation's history, an African American has been elected president. Moreover, voters turned out in record numbers in both the party primaries and the general election, including young, African American, and first-time voters.

The right to vote is looking strong, but what of the right to assemble? The Democratic Party's National Convention in Boston in 2004 was a low point for the right of assembly. The City of Boston divided space near the convention center into two areas: one where gatherings and demonstrations would be permitted, and one where they would not. The city supplemented this scheme by creating a "designated demonstration zone," a confined area under railroad tracks, demarcated in some places by a chain-link fence and barbed wire. According to the district court reviewing the constitutionality of the plan, the overall impression the zone created was that of an internment camp. Discouragingly for the right of assembly, the federal courts upheld Boston's scheme on appeal.

St. Paul and Denver did not cage demonstrators to the same degree at the 2008 conventions, and Barack Obama accepted both the Democratic Party's nomination and his elected office in open-air settings before assemblies in the tens of thousands. Nevertheless, American cities—including those hosting the recent conventions—continue to rely on the same regulatory and legal framework that led to Boston's 2004 debacle. The results are similarly complex divisions of space and time that ensure protests are undertaken at a "safe distance" from official audiences.

The article considers the history that has led to our acceptance of extensive legal regulation of public demonstrations—focusing on changes in both our regulatory practices with respect to public assemblies and our understanding of the constitutional right of peaceable assembly. It shows, among other things, that the 19th-century right to assemble on the streets without needing to ask permission was replaced, in the 20th century, with a right to assemble on the streets so long as one obtains a permit (if required), abides by the conditions of the permit issued, and is peaceable. The definition of "peaceable," moreover, was itself narrowed: Even where no permits are required, an assembly may be dispersed for obstructing, or potentially obstructing, traffic (including pedestrian traffic). The new constitutional understanding

did come with one important safeguard: One is entitled not to have permission to assemble on the streets denied arbitrarily, capriciously, or based on viewpoint. Nevertheless, through this change we replaced the notion that the state can interfere only with gatherings that actually disturb the peace or create a public nuisance with a legal regime in which the state regulates all public assemblies, including those that are anticipated to be both peaceful and not inconvenient, in advance through permits.

Large gatherings on public streets were central to the democratic politics that emerged after the country's founding. For the first century of our nation's history, elections—themselves often public celebrations—were part of an array of political practices, which included public meetings, petitions, local and national festive holidays, and even juries and mobs. These practices provided opportunities for citizens (ordinary and elite, enfranchised and disenfranchised) to participate in politics. Many of these opportunities took place in public places, including public streets and squares.

The examples are abundant. In Centreville, Maryland, in the midst of the crisis over the Alien and Sedition acts, Republicans gathered for an open-air assembly, militia maneuvers, and an open-air feast at which they toasted Jefferson and the Declaration of Independence, thereby taking a jab at the Federalist administration. In Hackensack, New Jersey, people gathered to affirm their sympathies to the French Revolution and, by implication, their opposition to the Federalist government. Such street politics persisted well into the 1800s, and by the mid-19th century, workers, racial minorities, and social movements all used city streets to further their political goals.

Such gatherings were, moreover, often spontaneous or organized quickly. Permits were not required through most of the 19th century. As late as 1881, San Francisco, Chicago, Detroit, St. Paul, and Denver had no permit requirements for assemblies in their streets. While 19th-century cities were both congested and capable of regulating through permits, the law interfered only with public assemblies that became disorderly. Legal regulation of gatherings on public streets and squares was limited to the criminal law. That is, the law intervened only after the fact if a gathering could be charged with unlawful assembly, riot, or breach of the peace. Citizens were not required to ask permission prior to exercising their right of assembly, and the government was not considered entitled to regulate in anticipation of possible disorder.

Understandings of the right of assembly reinforced this degree of access. Government interference with peaceful public gatherings was understood to violate the right of assembly. An Englishman's right of assembly, as adopted by Americans, was understood to extend to the "peaceable." Thus, the government was considered justified in restricting public assemblies only when they created public disorder, on the theory that only then were such gatherings beyond the protection of the constitutional right.

As such, initial efforts by municipalities to regulate gatherings in public places through permits were highly controversial. In fact, all but one of the state supreme courts to review the first municipal ordinances requiring a permit to lawfully gather on the streets found them void. These courts balked at the suggestion that general permit requirements were reasonable efforts to regulate street gatherings, emphasizing that the ordinances infringed upon important democratic and constitutional traditions of assembling. The Supreme Court of Kansas's outrage in the 1888 case *Anderson v. City of Wellington* is typical:

> This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together, with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows' organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-school children cannot assemble at some central point in the city and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in its march by the written consent of his honor the mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets under any circumstances without permission.

The risks of disorder and of interfering with the rights of others to pass were not considered sufficiently serious to justify the ordinances.

After the U.S. Supreme Court's decision in *Davis v. Massachusetts* (1897), the tide turned for litigation against permit requirements. The Court upheld municipal authority to prohibit speech and assembly on city property, and hence to allow it only with advance permission. After *Davis*, around the country, permit requirements for public assembly were accepted by state courts. Once judicial attitudes shifted, the new regulatory regime was established despite some continued political debate.

The result was a narrowing of the substance of the right of peaceable assembly. Moreover, the state's enhanced regulatory oversight came with an enhanced ability to shape the practice of public assembly in ways that undermined its meaningfulness for participants and its effectiveness as a check against government.

Today, both the requirement that citizens must ask for permission prior to assembling for political purposes and the conditions that the government may place on such assemblies can be used to undermine the effectiveness of public assembly as a mechanism to influence and check representative institutions. The very requirement of a permit creates a delay between the event triggering the desire to assemble and the assembling. Moreover, conditions can and have been used to distance assemblies from their target audiences through space and time.

Less appreciated, however, is the way that the very need to ask permission as well as the conditions placed on permits issued undermine the meaningfulness of political assemblies for participants. Through the former the people are rendered supplicant. While deprived of an actual (as opposed to virtual) audience, or forced to remain stationary, assemblies become a performatory ritual that bears little resemblance to the people outdoors as the agents and masters of American democracy. The lack of spontaneity and the forced ritualization of contemporary assemblies is the symptom of these tendencies of contemporary regulation.

Courts and academic commentators today fail to appreciate the significance both of the right of assembly itself and of the changes made to it. Major treatises on constitutional and First Amendment law barely mention the right of assembly. When they do, they do not question the Court's decision to consider it a mere facet of free expression.

The right of assembly protected social and political practices central to democratic government, not individual expression. It protected the people and their aspirations for collective public deliberation and action on issues of public importance. It also safeguarded a mechanism to influence and check government in particular circumstances. By emphasizing the political origins and collective functions of the right to assembly, this article begins to rectify the errors and omissions in the current understanding of this important right. □

Federal Preemption in Environmental Law


BRIAN BURGESS

Brian Burgess '09 worked as a research assistant to both Dean Richard Revesz and Vice Dean Barry Friedman. Those experiences piqued his interest in the issue of environmental federalism, and it wasn't long before Burgess was producing his own scholarship on the topic. The following extract is from "Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493," published in the April 2009 issue of the NYU Law Review. *It won the Judge Rose L. & Herbert Rubin Law Review Prize for most outstanding* Law Review *note in international, commercial or public law.*

A Connecticut native, Burgess graduated summa cum laude and Phi Beta Kappa from Dartmouth College in 2005 with a degree in philosophy. At NYU Law, he served as senior articles editor of the NYU Law Review. *He is currently clerking for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, and next year he will clerk for Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit.*

States have exhibited leadership in environmental policy, addressing issues of national and global scope. But this leadership is threatened by federal ceiling preemption that prevents states from adopting regulations that exceed federal standards.

Environmental law scholars argue that federal ceiling preemption has pernicious effects. These scholars fail, however, to adequately address the risk that states may adopt tough environmental regulations because they can externalize costs to other states, which may allow large pro-regulatory states like California to effectively dictate suboptimally stringent national standards. This note addresses this pro-ceiling preemption cost-externalization argument and contends its application is limited. It does so through a case study of California's regulations of greenhouse gas emissions from motor vehicles that the Bush administration preempted. The note argues that regulations that provide manufacturers with sufficient flexibility to meet standards without disrupting economies of scale can largely avoid externalizing costs to out-of-state consumers, and that states often also have to consider, at least indirectly, the interests of out-of-state producers when issuing regulations.

STATE ENVIRONMENTAL REGULATION

States have developed innovative environmental policies. Every state has now taken some action to address climate change, adopting strategies ranging from targeted measures to increase energy efficiency and promote alternative energy to far broader proposals to cap greenhouse gas emissions across entire state economies.

California has also led an effort to regulate greenhouse gas emissions from motor vehicles, relying on its unique authority under the Clean Air Act. The act preempts states from enforcing their own motor vehicle emissions standards, but makes an exception for California, which may petition the administrator of the Environmental Protection Agency for a preemption waiver. In 2002, California's legislature passed the nation's first law to regulate motor vehicle greenhouse gas emissions, and the California Air Resources Board subsequently promulgated regulations in 2004 establishing specific greenhouse gas reduction standards. While other states cannot adopt their own emissions standards, they can opt-in to California's program, and 16 states chose to do so to regulate greenhouse gases. Before California's emissions regulations can become effective, the EPA must approve California's waiver petition. In December 2007, the EPA denied California's waiver petition, the first time it had done so in decades. The Obama administration immediately decided to review this determination, and the new EPA administrator is widely expected to grant California's petition after completing formal reconsideration. The Obama administration has also announced an agreement to increase federal fuel economy standards, harmonizing them with California's stricter standards.

As exemplified by the initial denial of California's waiver petition, federal ceiling preemption in environmental law threatens state regulatory activity. It has expanded in environmental law as the result of broad interpretations of existing statutes by courts and agencies as well as the enactment of new legislation by Congress. Moreover, even presuming the Democratic Congress and presidential administration will be more interested in preserving the states' ability to adopt stringent environmental regulations,

questions about the proper scope of federal ceiling preemption are sure to arise. For instance, business leaders have argued that preemptive federal policies are necessary to address climate change, while state leaders have supported federal action but have lobbied against federal ceiling preemption. Properly analyzing such questions requires precision about the tradeoffs involved in either permitting or preempting state environmental policies.

COST EXTERNALIZATION

Federal ceiling preemption has costs, but it may be justified when state regulation externalizes costs. Cost externalization—an inevitable byproduct of a nation divided into 50 geographic zones—refers to instances when states and their residents do not bear the full cost of the regulations they pass, because significant costs are borne by out-of-state consumers and producers. It distorts the incentives of state governments and regulators, leading them to enact stringent environmental regulations to gain benefits like environmental protection for their constituents at the expense of others. Federal ceiling preemption is proffered as a solution to this problem, as it allows the federal government to consider and balance all of the costs and benefits of regulation.

A principled argument against the use of federal ceiling preemption in environmental law must therefore address whether and when state environmental regulations externalize costs. Proponents of the extensive use of federal ceiling preemption suggest state regulations may often externalize costs, particularly when states regulate products with national markets and economies of scale in production. California's regulation of motor vehicle emissions is referenced as a paradigm example. These regulations, the argument goes, may externalize costs to both out-of-state consumers and out-of-state producers. Consumers are affected if the regulations increase the cost of motor vehicles in their state, either by affecting economies of scale and increasing marginal production costs, or by forcing manufacturers to adapt vehicles to meet more expensive California standards nationally. Producers and their workers may be affected if California's regulations make automobiles more expensive, which could decrease sales, reduce profits, and affect employment rates.

This note's case study of California's regulations suggests that these fears may be overblown. California's regulations are designed in a way that minimizes disruption to economies of scale, and the argument that the state is insulated from the costs it imposes to producers beyond its borders seems exaggerated.

CALIFORNIA ASSEMBLY BILL 1493

California's regulations under A.B. 1493 limiting tailpipe emission of greenhouse gases grew out of the state's preexisting Low Emission Vehicle Program (LEV). Following the model of prior LEV regulations, A.B. 1493 set emissions standards for two different vehicle categories for new cars sold within the state (determined by vehicle weight) based on grams of carbon dioxide emitted per mile driven, calculated on a fleet-average basis. The regulations do not directly impose fuel economy standards—and indeed, legally they may not under the federal Energy Policy and Conservation Act—but the majority of emissions reductions are accomplished through enhanced fuel economy, and greenhouse gas emissions standards can be converted to approximate miles-per-gallon requirements. When the regulations were passed, 2009 model-year cars were to require a one- to two-percent emission reduction; ultimately, 2016 model-year cars were to meet emissions reductions of up to 30 percent.

As discussed above, in 2007 the EPA administrator denied California's Clean Air Act waiver. Assuming, reasonably, that it was within the administrator's legal discretion to either grant or deny the waiver, what is the better policy? The answer ultimately turns on the issue of cost externalization. In other words, do California's greenhouse gas emissions regulations allow it, as a single large state, to impose substantial costs beyond its borders to consumers and producers, and effectively dictate national policy?

Looking first at the regulation's potential impact on out-of-state consumers, the vehicle emissions standards' reliance on fleet-wide averages—rather than mandates per vehicle—may allow manufacturers to meet California standards without having to make modifications across product lines, minimizing the impact on out-of-state consumers. Manufacturers do not have to build new "California cars." Instead, they can alter the mix of car models sold in a jurisdiction. Even for 2009 model-year cars—the first model year for which California's regulations were scheduled to apply—most leading automobile manufacturers have at least some vehicle models in their fleet that could comply with California's standards.

The car industry has actually recognized the possibility that California's regulations could be satisfied by adjusting in-state sales. In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* (2007)—a case brought in federal district court by members of the car industry to enjoin on preemption grounds Vermont's adoption of California's standards—a General Motors executive director testified that the company might have to gradually restrict products offered in jurisdictions like Vermont that adopted the more stringent emissions regulations. While this prediction was offered as an argument against the state regulations, the case for preemption is thin when states primarily restrict the consumption options of their own constituents. If state residents become dissatisfied with their consumer options, or if they come to believe the regulations are ineffective, they can pressure government officials to change them.

The fact that California's regulations may affect Michigan's economy...is not sufficent to justify federal ceiling preemption.

Commentators have also suggested that California's greenhouse gas regulations would negatively affect out-of-state producers. It is reasonable to presume that the regulations would impose initial additional costs on the already struggling car industry, though the regulations might also benefit the industry in the long term. In any case, the fact that California's regulations may affect Michigan's economy does not establish that the regulations are suboptimally stringent, and it is not sufficient to justify federal ceiling preemption. The key issue is whether stringent regulations result from cost externalization, or whether state regulators and politicians consider the interests of other states. To this end, the argument that California voters have little incentive to protect Michigan's interests is appealing in the abstract, but the case is overstated.

First, California voters do bear some of the costs of their more stringent vehicle emissions regulations, in the form of increased prices and possibly reduced consumer options. If producers can pass on their increased production costs to consumers within the jurisdiction, then the cost of the regulation will be at least partly internalized. Second, the notion of a

complete "free lunch" for legislators is rather idealized. Out-of-state interests often lobby state governments, and they may have the support of in-state groups with whom their interests align, such as car dealerships supporting automobile manufacturers. Additionally, the line between in-state and out-of-state interests is blurred due to the dispersed ownership of large public companies like General Motors and Ford Motor Company.

CONCLUSION

Despite broad suggestions to the contrary, the scope of cost externalization for particular state environmental regulations may turn out to be fairly minimal. As the magnitude of any regulatory cost externalization decreases, it becomes increasingly doubtful that federal ceiling preemption is desirable in light of the benefits of state-based environmental regulation, including the value of tailoring standards to local preferences and conditions, the importance of state-level experiment for technology development, and the value of decentralized democratic decision-making. Policy makers should therefore look closely at the realities of cost externalization before determining whether federal ceiling preemption is appropriate. □

Two More NYU Scholars Receive Honors

MATTHEW LAWRENCE '09 WAS the winner of the Barry Gold Memorial Health Law Student Writing Competition, which recognizes J.D. work that analyzes a New York or federal health law issue and its impact on New York State law or the state regulatory environment. In his paper, "Contractual Alternatives to Malpractice Liability in New York: Are Voluntary Exculpatory Agreements Enforceable?," Lawrence explores agreements in which patients waive malpractice rights in exchange for a lower fee. The note was published in the winter issue of the NYS Bar Association *Health Law Journal*. "I owe a great deal of gratitude to the Law School community, which is tremendously supportive of student writing," Lawrence said. He singled out Sylvia Law, Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry, from whom he took a health law class, for advising him.


Lawrence


Harpalani

Vinay Harpalani '09 was selected Student Scholar at a conference hosted by Latino and Latina Legal Critical Theory, in Seattle. Harpalani's paper, "Formal, Material, and Symbolic Modes of Racialization: Examining South Asian Americans' Access to 'Whiteness,'" examines South Asian Americans to explore the concept of whiteness as a form of capital sought by various groups. "The conference was an incredible experience and opportunity," Harpalani said. "The entire LatCrit community not only embraced me, but treated me like a keynote speaker."

Harpalani, who holds a Ph.D. in education from the University of Pennsylvania, gratefully acknowledged the guidance of Professors Paulette Caldwell and Cristina Rodríguez. The two "have been my academic mentors at NYU," he said. "Working with them has allowed me to better understand how law develops in the social and political context." □

Around the Law School

U.S. Secretary for Housing and Urban Development Shaun Donovan was the keynote speaker last February at the Furman Center for Real Estate and Urban Policy's conference, "A Crisis is a Terrible Things to Waste: Transforming America's Housing Policy."

Appointing Judges to Keep Them Impartial

Resnik, O'Connor, Dinh, Greenhouse, and Brandenburg

At a November panel discussion on judicial independence, Sandra Day O'Connor described the unusual jurisprudence of Roy Bean, a justice of the peace in the late 1800s who held court in a West Texas saloon with signs advertising both law west of the Pecos and cold beer. Bean, she said, expected the people in his saloon-cum-court to buy drinks during recesses or risk being held in contempt. The tables are turned today, O'Connor implied, as judges are "elected in partisan campaigns that have become increasingly expensive and unwieldy and nasty. It's difficult to believe that judges can remain neutral when they have to so often think about the popularity of their opinions and who it was that donated to their campaigns." (In June, the U.S. Supreme Court ordered West Virginia's chief justice to recuse himself from a case involving a coal company whose chief executive gave $3 million to the judge's campaign.)

Other judiciary experts agreed with O'Connor in the discussion, cosponsored by the American Academy of Arts and Sciences and Georgetown University Law Center and moderated by journalist Linda Greenhouse. Professor Judith Resnik '75 of Yale Law School gave a crash course in the evolution of the judiciary as its image shifted from state servants who had to be kept honest to independent actors conducting transparent public proceedings.

Resnik contrasted the roughly 100,000 annual federal court proceedings in the U.S. with the more than 700,000 federal agency proceedings conducted by statutory judges who do not enjoy the life tenure of their counterparts. Various interest groups, Resnik said, work to influence the selection of administrative law judges: "The challenge is how to build a culture of commitment to independent judges."

The vast majority of state-court judges, who handle more than 98 percent of litigation proceedings, are elected, and in the 2008 contests, candidates spent $17 million on television ads alone, said Bert Brandenburg, director of the Justice at Stake Campaign. Playing several of the mudslinging commercials for the audience, he called such ads "the equivalent of what french fries are to nutrition in terms of the ability to make an informed choice."

Finally, Viet Dinh, a Georgetown law professor and former assistant attorney general in the second Bush administration, discussed which forms of criticism directed toward the judiciary were valid, and which were simply attacks. "Our job is to help our judges make sure that we are indeed a government of laws and not of men," said Dinh. "Obviously one cannot exclude public criticism of judges altogether. Rather, one wants to channel constructive criticism into improving the work of judges."

O'Connor observed that the Framers provided for judicial appointments rather than elections, which did not come about until Andrew Jackson's presidency. "The judicial branch is a critically important branch," said O'Connor, "and we want to have all of our courts staffed by judges who are decent and honorable and who do a pretty good job." □

WENDY BARROWS

Holbrooke Blasts Missteps in Afghanistan

In a bold and forceful speech last October, former U.N. Ambassador Richard Holbrooke forecast that the forgotten war in Afghanistan, now in its eighth year, would eventually be the longest in American history, surpassing even Vietnam. "Success, however you define it, is not going to come easily," he said in the keynote address for "Afghanistan Today: Drugs, Detention, and Counterinsurgency," a conference hosted by the Center on Law and Security and the New America Foundation.

Following an overview of the current state of Afghanistan, participants including Afghan Ambassador to Canada Omar Samad, Lieutenant General David Barno, and David Kilcullen, a senior counterinsurgency adviser to General David Petraeus, discussed topics such as counterinsurgency, rule of law, and the drug trade.

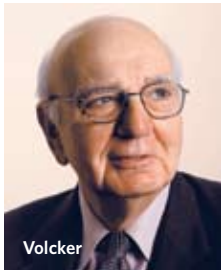
A former assistant secretary of state to Bill Clinton who negotiated the 1995 Dayton Accords that ended the war in Bosnia, Holbrooke would be appointed President Obama's special representative to Afghanistan and Pakistan a few months after this speech. Saying he was relating his own personal views, not those of the Obama campaign, Holbrooke offered a blistering critique of U.S. missteps in Afghanistan that he said had led to the resurgence of the Taliban, an increase in violence, and record-high levels of illegal drug production. He was direct in where he laid the blame,

Bringing the Whole World in Concert

British prime minister Gordon Brown, former U.S. Secretary of State Madeleine Albright, and former Chairman of the Board of Governors of the U.S. Federal Reserve Paul Volcker stressed the importance of the participation of many countries in a multilateral approach to tackle the world's most pressing problems, including the global financial crisis, climate change, terrorist threats, and poverty. "I believe that the world must come together to deal with problems that we know exist, but problems that I believe are soluble," Brown said in a March conversation at NYU called "A New Multilateralism for the 21st Century."


Albright


Brown


Volcker

The prime minister said the economy could double in the next 20 years if individual countries restructure their banking systems, have a set of policies addressing impaired assets, and create standards of conduct governing areas such as executive compensation. He also suggested that countries must agree about the injection of resources into the economy and that funds need to be made available to deal with Central and Eastern European banks. "Now global leaders recognize the need to cooperate and see the solution doesn't just lie in their country," he said.

The other speakers acknowledged that multilateralism may be difficult but is necessary. "London and New York are not the only financial centers in the world," Volcker said. "Getting a consensus to move together is important. This can't be done alone."

Albright, who joked she was known as Multilateral Madeleine at the U.N., said she was glad the Obama administration has abandoned the "War on Terror" phrase. "The people who attacked us on 9/11 and in London and Mumbai are murderers," she said. "They want to be known as warriors, but they are murderers. We want to find a different way to deal with this; assertive multilateralism is basically working together on this problem."

Referring to climate change and the enormous amount of money that must be invested in the next 10 to 12 years to avoid the most serious risks, Richard Stewart, University Professor and John Edward Sexton Professor of Law, asked the speakers what financial and political mechanisms will get developing countries on the path to participating in and developing sustainable economies.

Brown responded that there should be two priorities for the climate conference in Copenhagen that would occur in December: getting all countries to accept intermediate, rather than long-term, deadline targets for compliance in areas such as reducing carbon emissions, and having a financing mechanism available to commit funds over a longer period of time. "The big cost will be if we don't do anything," Volcker said. "The cheapest thing we can do is to undertake some of these costs now."

The event was part of the UK/US Study Group, created by Brown to advise him informally on the role of British and American universities in the context of this century of change. NYU President and Benjamin F. Butler Professor of Law John Sexton thanked Brown for creating the group, of which NYU is a member. □

saying to the assembled counterterrorism experts, military advisers, journalists, and Mideast scholars, "There is more expertise about Afghanistan in this room" than there was in the "entire Bush administration."

Besides singling out the decision by former Defense Secretary Donald Rumsfeld to withdraw troops from Afghanistan, Holbrooke condemned the U.S.-led drug eradication program, which he called "the single worst American foreign-assistance program I have seen.

"This not only is a waste of money, but it actually helps the enemy," he argued. "It's a recruiting tool for the Taliban.... What they're really doing is helping one drug guy against another in a local competition for market share." Drug eradication will succeed only if drug lords, rather than small farmers, are targeted—and only if Afghanistan's economy is overhauled with irrigation projects, new roads, and the distribution of seeds and fertilizer, he said.

Holbrooke endorsed the need for more U.S. and NATO troops to counter an increasingly powerful Taliban. But he cautioned that a military response must be carefully calibrated to avoid triggering a backlash of xenophobia. And he said that Americans must understand that reengagement in Afghanistan would be a long and costly project but necessary to counter al Qaeda's spread. "The Bush administration did not level with the American public about the long-term nature of this war, and the next American president must," he said. "If it matters to us, we have to hunker down for the long haul." Given Holbrooke's current status, he now can position the United States to see this war through. □

"We have lacked a grand strategy to describe what we're trying to do in this particular period [in Iraq and Afghanistan], and it has made it difficult for the people that are fighting the war at the lowest level to understand where we're headed, why we're headed there, and how we're headed to get the job done."

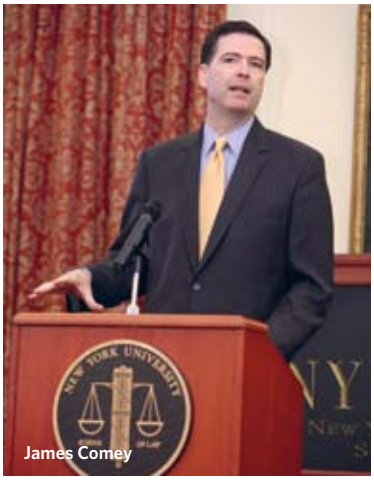
Retired U.S. Army General
John Abizaid,
former commander of the U.S. Central Command, at the April 24 Center on Law and Security conference, "Today's Military: Its Challenges, Missions, and Future."

Judgment by Prosecutors?

The Center on the Administration of Criminal Law convenes top litigators to discuss the power of discretion.

With more than 90 percent of criminal cases ending in plea bargaining or charge bargaining rather than going to trial, prosecutors wield enormous power as adjudicators in the criminal justice system. The NYU School of Law's new Center on the Administration of Criminal Law, headed by Anthony Barkow, a former federal prosecutor, and Professor Rachel Barkow, is the only center of its kind to focus on prosecutorial power and discretion, advocating good government practices in criminal matters.

Samuel Buell '92, Kate Stith, Brandon Garrett, Mary Jo White, Theodore Wells Jr., and Mark Schonfeld



James Comey

In its first year, the center saw the reasoning of its first amicus brief, on behalf of the defendant in *Abuelhawa v. United States*, echoed in the U.S. Supreme Court's ruling on the case. The Court decided that a person committing the misdemeanor of buying drugs for personal use could not also be charged, along with the seller, with the felony of using a cell phone to facilitate a drug sale. Executive Director Anthony Barkow has filed amicus briefs in a number of other cases and also observed the Guantánamo military commission proceedings. Faculty Director Rachel Barkow has published several recent articles on prosecutors and sentencing, including one on reconceptualizing clemency that foreshadows the center's plans to enter into and reinvigorate the policy debate on pardons and commutations. The center has also filed comments with the U.S. Sentencing Commission about forecasting the various costs of pending federal criminal legislation.

The ongoing increase in prosecutorial adjudication, coupled with the government's and the public's keen interest in the corporate malfeasance that contributed to the current global economic crisis, made the theme of the center's May 8 inaugural conference, "Regulation by Prosecutors," particularly timely.

Recalling the period when the pursuit of white-collar crime had seemed to peak, keynote speaker James Comey said, "The public storm of the Enron era, that period of 2001 to 2004 or 2005, was a mere breeze compared to the gale in which white-collar prosecutors and defense lawyers and all the rest of us now live." A former U.S. deputy attorney general under John Ashcroft and Alberto Gonzales, chair of President George W. Bush's Corporate Fraud Task Force, and former U.S. attorney for the Southern District of New York, Comey oversaw the prosecution of Martha Stewart and other high-profile defendants at WorldCom, Adelphia, and ImClone.

Anthony Barkow

As a prosecutor of corporate crimes, Comey was faced with a thorny question: "Once we've made the cases against the bad guys, what do we do with the place; what do we do with the corporation?" And what about the good guys? The collateral damage involved in the potential failure of a company occupied his thoughts when making a decision. Sometimes, he said, prosecutors can best meet their goals through deferred prosecution agreements and non-prosecution agreements, in which the prosecutor agrees not to go after a corporation in exchange for concessions from the entity such as fines, monitoring, and changes in the firm's structure.

Regarding deferred prosecution agreements, Jennifer Arlen '86, Norma Z. Paige Professor of Law, said it was important for prosecutors to focus less on the direct regulation of the compliance program set out by an agreement and more on using the threat of prosecution to compel firms to cooperate in bringing wrongdoers to justice. "Individual liability is vitally important, and it's the only way you can truly deter corporate crime," Arlen said. "People who do wrongs must think they will go to jail and be severely punished, and prosecutors can only do that if they focus the full weight of that threat on cooperation and self-reporting."

Mary Jo White spoke to both sides of these cases. As a partner at Debevoise & Plimpton, she defends clients from white-collar criminal charges; when she was U.S. attorney for the Southern District of New York—the only woman who has ever held that position—she won convictions against Bankers Trust Company and Republic New York Securities Corporation. White argued that while it can be a necessary tool in certain instances, corporate criminal liability is sometimes overused. "I think prosecutors are at their best when they prosecute or they don't," she said, "and if you stray very far from there, you're on a very slippery slope."

Expressing deep reservations about allowing the prosecutor to decide whether a company has breached a deferred prosecution agreement, Richard Epstein, who will join the faculty of the NYU School of Law beginning in 2010, explained, "They're going to decide whether or not you've been in breach of that agreement when they can throw the sword of Damocles on you. What that does subtly is it takes the prosecutorial function and makes it into an adjudicative function." Epstein shared Arlen's preference to focus on individual prosecutions.

The biggest risk of prosecutorial discretion was summed up by Paul, Weiss, Rifkind, Wharton & Garrison partner and white-collar criminal defense lawyer Theodore Wells Jr., who, citing an example of the immense power prosecutors hold, equated a corporate indictment with a death penalty threat: "There's not a lot of checks and balances going on." □ *Atticus Gannaway*

Furman Center Goes Inside the Housing Crisis

HUD Secretary Donovan announces big policy plans.

Only three weeks after Shaun Donovan was sworn in as the 15th U.S. Secretary of Housing and Urban Development, he came to Vanderbilt Hall to deliver a major policy address outlining the Obama administration's ambitious plans for responding to the housing crisis.

"It's a little early for me to be speaking out," acknowledged Donovan, the keynote speaker at the Furman Center for Real Estate and Urban Policy's February housing policy conference. "No speechwriter, no assistant secretary. It's a little bit of a risk for me, doing this today." But, he added, NYU was "the only place" he'd want to give his first policy speech.

In fact, Donovan has a long-standing relationship with the Furman Center, a joint research center of the Law School and the Robert F. Wagner Graduate School of Public Service. After serving as a deputy assistant secretary for HUD during the Clinton administration, Donovan was a Furman Center visiting fellow in 2001-02, studying ways to preserve federally assisted housing. Subsequently, as New York City Housing Preservation and Development commissioner, he relied on Furman Center research about the New York City real estate market to inform policy decisions. More recently, center co-director Ingrid Gould Ellen, associate professor of public policy and urban planning at the Wagner School, served during the Obama transition as a member of HUD's agency review team, and remained a policy adviser for a few months after the inauguration while Secretary Donovan put his team in place.

Donovan began his speech at the Furman Center's conference, "A Crisis Is a Terrible Thing to Waste: Transforming America's Housing Policy," by citing "terrifying" statistics: 2.2 million foreclosures in 2008, and in December alone 45 percent of home sales were foreclosures or short sales. Donovan then vowed that one of HUD's top priorities would be to step up the loan modification process. (A few days later, President Obama announced an aggressive plan to help up to nine million homeowners by providing billions in funds to Fannie Mae and Freddie Mac and offering financial incentives for lenders to reduce mortgage rates.)

Donovan's speech—in which he also revealed his long-term goals for HUD—generated a flurry of news coverage from outlets such as CNBC, the *New York Times*, and the *Wall Street Journal*. Many reporters noted Donovan's announcement that HUD would, for the first time, focus on sustainability issues, striving to make public housing a model of energy efficiency. Residential housing accounts for 28 percent of greenhouse gas emissions in the United States, and as many as one in 10 households resides in buildings that are in some way connected to HUD, Donovan said: "We can catalyze an enormous change in the way that housing gets built and renovated." He announced the creation of the Office of Sustainability, to be run by Ron Sims, Washington State's King County executive. Sims has a national reputation for his environmental stewardship and was unanimously confirmed as deputy secretary of HUD by the U.S. Senate in May.

Ellen, Donovan, Been, and Judith Rodin, president of the Rockefeller Foundation, a conference co-host

Also noteworthy was Donovan's pledge to make fair housing part of HUD's mission. A 2007 Furman Center analysis found that the 10 New York City neighborhoods with the highest rates of subprime mortgages had black and Hispanic majorities, while the 10 areas with the lowest rates were composed largely of non-Hispanic whites. "We have to ensure we never again have targeting of communities," he said.

Funded by the Rockefeller Foundation and the MacArthur Foundation, the Furman Center's conference also featured addresses as well as roundtable and panel discussions by economists, bankers, scholars, and policy makers. A talk about mortgage-backed securities (MBS) included Joseph Tracy, executive vice president of the Federal Reserve Bank of New York; Austan Goolsbee, member of the Council of Economic Advisers and staff director of the Obama administration's Economic Recovery Advisory Board; Lawrence White, Arthur E. Imperatore Professor of Economics at NYU; and Lewis Ranieri, chairman of Ranieri Partners, a private investment advisory firm. Described as an inventor of MBS, Ranieri introduced himself as "Dr. Frankenstein" and engaged in a spirited discussion with the panelists on how MBS—initially a boon to homeownership—became a curse, causing the housing bubble that wreaked havoc on the U.S. economy. Some of the panelists argued that to avoid future subprime messes, mortgage originators should be required to "have skin in the game" and retain some of the risk of loan defaults.

Each session was designed to generate candid discussion about the challenges and opportunities of the current crisis, and to end with specific policy recommendations for moving forward. At press time, the center was working on a summary white paper to deliver to the Obama administration.

"The conference helped the Furman Center move outside of its sometimes New York–centric research to more explicitly engage in federal policy debates," said Vicki Been '83, director of the Furman Center and Boxer Family Professor of Law, a few months after the event concluded. "The center has remained a critical part of this discussion and will continue to take on research with national policy implications." □

Pamela Kruger

Four Questions for...

JUDGE MARSHA BERZON OF THE U.S. Court of Appeals for the Ninth Circuit has not spent much time contemplating glass ceilings; instead, she has blazed trails for women in law. Berzon served as associate general counsel to the AFL-CIO while pursuing a private labor-law practice at the San Francisco firm she cofounded, now named Altshuler Berzon.

During her years as a practicing attorney, Berzon specialized in labor, employment, and First Amendment law as well as women's rights and federalism, and argued four cases before the U.S. Supreme Court. Her winning performance in the 1991 Supreme Court case *Automobile Workers v. Johnson Controls, Inc.*, in which Berzon submitted that women could not be removed from jobs that their employers considered hazardous to children the workers might conceive, later resulted in the rare compliment of a letter of support for her Ninth Circuit nomination from the opposing counsel in that case. Nevertheless, Berzon's nomination by President Bill Clinton languished in committee for more than two years; she was finally confirmed in March 2000 by a recalcitrant Republican Senate. Since ascending to the bench, she has written opinions for cases involving alleged negligence by the Immigration and Naturalization Service, California's "three strikes" law, the Family and Medical Leave Act (FMLA), and the City of Tucson's refusal to fund a religious group's use of a public park.

Berzon speaking with Norman Dorsen and other members of the NYU Law faculty

Berzon began her legal career as a clerk to Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit. Even then, she was something of a pioneer as the uncommon clerk with a young child. Appropriately enough, Berzon eventually had a hand in the formulation of the FMLA (1993). She delivered the 2008 James Madison Lecture, "Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts," at NYU last November, following in the footsteps of notable jurists such as U.S. Supreme Court Justice William J. Brennan Jr.; as it happens, Berzon was Brennan's first female clerk. The implications of this distinction seemed like a good starting point for a brief Q&A with the *Law School* magazine.

You are still in the minority as a woman on a federal appeals court bench. Why is that? It has mostly to do with the trajectory of women going to law school. I graduated from Boalt in 1973, and at my 30th reunion I asked some of my classmates how many women were in our law school class. The men all said 50 percent, and the women all said 10 percent. The actual number was 20 to 25 percent. So I would say that there weren't 50 percent of women in law school ▷

Accountability and Argentina's Dirty Wars

As chief justice of the Supreme Court of Argentina, Ricardo Luis Lorenzetti is at the center of efforts to redress the human rights abuses in his country's dark past. A guest of the Law School's Center for Human Rights and Global Justice last November, Lorenzetti described how his court has brought to justice the perpetrators of Argentina's Dirty War, the period from the mid-1970s to the early 1980s when thousands were unjustly arrested, tortured, killed, and "disappeared" by the country's military dictatorship.

Juan Méndez, president of the International Center for Transitional Justice, cohost of the event, pointed out that Argentina's Supreme Court has only recently won a public perception of independence and impartiality, due partly to court appointments made by former President Néstor Kirchner. Méndez, who himself had been arrested and tortured by the Argentine government, asked about the "right to truth" established by the courts in the 1990s regarding the fates of disappeared persons.

Lorenzetti described a series of landmark rulings that brushed aside claims of statutory limitations on Dirty War atrocities and that held unconstitutional certain amnesty laws and pardons protecting offenders. These decisions have allowed prosecutions to be brought against former police officers, military officials, and even a priest. The priest, a Buenos Aires police chaplain, heard the confessions of prisoners in secret detention centers and then violated the sacrament of confession by passing those confidences to torturers.

Acknowledging that some see these actions as retroactive applications of the law and argue that they hinder reconciliation, Lorenzetti advocated justice. That kind of justice, he said, requires the will of the other government branches and of society, and a supportive international community. "The importance of these processes does not lie only in the punishment of the people held responsible, but in the future," said Lorenzetti. "The assurance that there can be no law or pardon for those who commit acts of political persecution, and that sooner or later they will be subjected to judicial process, is a strong institutional incentive to prevent state terrorism."

until about 15 years after I went to law school; that group should be hitting eligibility for judgeships now.

What remain the toughest issues for women in the law? Obviously there are major issues about working for firms and juggling a family life. People always ask me how I did it, and I say, first, that I have amnesia, so I don't know. Second, I always in some sense worked for myself. I had cases and clients and responsibilities, but I didn't have to have face time for anybody. Every so often I would declare a sabbatical for myself and take off a month or two, and people in big firms don't get to do that.

As someone who spent many years arguing union-related cases, what do you see as the role of unions in 21st-century labor law? Much of what I argued were cases brought by labor unions that weren't really labor cases, and labor unions will be doing a lot of that not only in the legal field but elsewhere, trying to support workers in general as a way of helping themselves.

What kinds of changes, subtle or not, do you think will emerge in the judiciary during the presidency of a lawyer, especially one who taught constitutional law? I certainly hope President Obama will really put effort into judicial selection. There was a tendency in the Clinton administration to put this at the bottom of the list of things they cared about. My own experience was that I got nominated and then had to get myself confirmed. There was very little assistance. □

A Cautionary Stance on Genomics and Race

PATRICIA KING, CARMACK WATERHOUSE Professor of Law, Medicine, Ethics, and Public Policy at Georgetown University Law Center, was candid about her bioethical concerns when she delivered the 2008 Dorothy Nelkin Lecture, "A Dangerous Crossroad: Race, Genomics, and Medicine," last October.

King, a member of the Ethical, Legal, and Social Implications Working Group of the National Institutes of Health's (NIH) human genome center, said she harbored reservations about the trend toward minority inclusion in NIH research, because it introduced potentially distorting racial considerations to the scientific process. "In the past, genetic frames, genetic models, genetic information had been used in ways to suggest that there was a biological basis for race," said King. "And we knew that there was more attention paid to these genetic explanations than there were to the social and cultural and economic factors that also helped explain health and disease."

As King had predicted, the Human Genome Project, begun in 1990, eventually began to study human variation. In hindsight, she said, "despite the essential finding of the Human Genome Project that humans are more alike than different, that there is more variation within population groups than between populations, despite that essential finding, the focus has steadily built on the idea that there must be something to difference, and the way we should try to explain that difference is by reference to the concept of race, a concept that is ambiguous and tends to cover many issues without adequate explanation."

King acknowledges that the accumulation of data is itself not the problem, but she remains troubled by how the data is interpreted: "While we know that most of the health disparities I'm concerned with can be dealt with by focusing on social, environmental, and cultural aspects of this problem, one of the big dangers is that we would look for genetic explanations for disparities more than to more complex, holistic explanations."

King ended her lecture with an example of how medicine might operate in an ideal world. In the early 1990s, the medical establishment became aware that significantly more whites than blacks received kidney transplants, despite the fact that a larger proportion of African Americans suffer from kidney ailments. Researchers eventually realized that the organ allocation policy was flawed: It was based on antigen matching, and African Americans have more antigen variation than whites. Health officials subsequently instituted less stringent criteria for antigen matching. The anecdote had a deep impact on King: "What I was struck by was, when confronted with a difference in an area that was of enormous concern to African Americans, the way was not to ignore the difference but to see if difference could be made to work in a more positive fashion." □

Israeli President Shimon Peres on Peace

NOBEL PRIZE WINNER PRESIDENT SHIMON Peres of Israel delivered "The Globalization of Peace," analyzing the conflict in the Middle East and forecasting the region's political future. The lecture was sponsored by NYU's Taub Center for Israeli Studies last September. Peres enumerated what he saw as the three primary roots of dispute in the Middle East: religious zealots attempting to halt the forces of modernity in favor of their traditional beliefs; Iran's plays for hegemony in the region; and clashes between Israel and its Arab neighbors. In its 60 years, Peres said, Israel had endured seven wars, "outgunned, outnumbered," and "demonstrated that democracy, even if it doesn't have the right numbers or the right weapons, can win a war."

But Peres, who won the 1994 Nobel Peace Prize for his participation in the peace talks with Palestinians that led to the Oslo Accords, also pointed to Israel's peace agreements with Egypt and Jordan: "We prefer an imperfect peace to a perfect victory or a perfect war." □

China's Courts: Legit or Puppet?

The long-standing reputation of China's courts—reinforced by press accounts—is that they are controlled absolutely by the Chinese Communist Party (CCP). Judges barely apply the law, let alone innovate; they just take direction from the party. But is this true? After 30 years of legal development and a rapid increase in law schools, lawyers, and legal knowledge, are judges still mere mouthpieces of the party? Can the CCP have such control when more than eight million cases are filed annually in cities and villages, many of them thousands of miles from Beijing?

Stern, Minzner, Howson, Liebman, He, and Upham

Frank Upham, Wilf Family Professor of Property Law and co-director of the Law School's U.S.–Asia Law Institute, sought to investigate these hoary assumptions and tear down any misconceptions about China's courts. Coordinating with Ben Liebman of Columbia Law School, Upham made great strides with "China's Changing Courts: Populist Vehicle or Party Puppet?" a discussion last February featuring a panel of China law scholars: Xin He of the City University of Hong Kong School of Law and an NYU Hauser Global Visiting Professor; Nicholas Howson of the University of Michigan Law School; Carl Minzner of Washington University School of Law; and Rachel Stern, a Ph.D. candidate at the University of California, Berkeley.

While China's courts have made progress in developing a rule of law during the past three decades, Liebman has noticed current party rhetoric beginning again to emphasize the preeminence of CCP ideology. Howson seemed to confirm this observation in his description of recent corporate cases in Shanghai: The 2006 Company Law gave courts more authority to determine legal claims, but Shanghai courts have instead abdicated some of their statutorily imposed responsibilities.

Stern and He both provided contrast with a more positive assessment in environmental and labor cases, noting that there has been innovation occurring in the margins of cases in these areas. Hinting at one potential evolution of China's courts, Minzner described the current incentive system that rewards judges and government officials for meeting targets instead of being faithful to the spirit of the law.

Ultimately, "China's Changing Courts" did not just delineate the changes to China's courts, but also showed that China is a nation at a crossroads. It remains to be seen whether the nation will allow greater innovation and court-initiated legal development, tie the courts more tightly to the party, or find a middle ground that will fit with China's own modern development. □

Faculty Confer Abroad: A Different Kind of Global Warming

Engaging with scholars, policy makers, and industry leaders from around the world, members of the faculty held conferences in Geneva, Abu Dhabi, and Beijing on conflicts over global regulation and its governance. The goal was to build a legal framework for addressing and managing these tensions—an improvement on current ad hoc practices that lead to errors and ineffective compromise, says Benedict Kingsbury, Murry and Ida Becker Professor of Law and director of the Institute for International Law and Justice, the events' co-sponsor. "There are high stakes in these issues," he said. "A structured framework for organizing and controlling practical uses of power by international organizations is much needed and is essential for them to work effectively."

"NYU's engagement with Europe, the Gulf, Asia, and elsewhere enhances our position as a truly global university," said Simon Chesterman, director of the NYU@NUS Singapore program. Invited scholars presented papers that contribute to the IILJ's Global Administrative Law Project, a research initiative led by Kingsbury and University Professor Richard Stewart, chair and faculty director of the Hauser Global Law School Program and director of the Frank J. Guarini Center on Environmental and Land Use Law.

Kingsbury, Stewart, and Kevin Davis, Beller Family Professor of Law, have also just launched the Global Partners Initiative with a substantial financial commitment from the Canadian-based International Development Research Centre. The GPI will work with leading developing country institutions on economic and social regulatory issues of concern to the global South. "It is critically important for us to forge collaborations in countries that will be the most important players on the international scene in the years to come," said Davis.

The GPI participants convened for the first time in May in Beijing, where Tsinghua University hosted a nine-nation conference focusing on the legal context of China as a key player in the future of global economic and environmental regulation. "China clearly faces very significant problems in the environmental sphere and is now grappling with ways to ensure that its rapid economic growth is not at the expense of its environment," said China law expert Professor Jerome Cohen. "The symposium demonstrated the value of sustained engagement with Chinese legal scholars." The GPI scholars, who came from Argentina, Brazil, Canada, China, Colombia, India, Italy, South Africa, and the United States, also discussed capital development, sovereign wealth funds, trade, intellectual property, regulatory and institutional reform, and trade protectionism.

In March in Geneva, the discussions focused on the complex issues of accountability of far-flung international organizations such as the World Health Organization, including questions of human rights protection and legal liability for harms caused by their operations. And in May in Abu Dhabi, representatives from countries rich and poor, banks, and NGOs debated new ways of channeling funds to developing countries to limit greenhouse gas emissions while maintaining or even accelerating clean development. "Bringing together experts in development, finance, trade, and tax," said international tax specialist Professor Mitchell Kane, "makes a much deeper contribution to solving climate change problems."

A Rational Way To Be Earth-Friendly

LAUNCHED LAST SUMMER, THE INSTITUTE for Policy Integrity, housed in the Frank J. Guarini Center for Environmental and Land Use Law, is a nonpartisan think tank advocating a version of cost-benefit analysis that promotes social well-being and superior economic returns and is not biased against government regulation. IPI's mission echoes the main argument of *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008), written by IPI faculty director Dean Richard Revesz and Executive Director Michael Livermore '06.

Among the stream of policy documents from IPI in its first year, the most notable are "The Road Ahead" by IPI fellows Inimai Chettiar and Jason Schwartz '06, who analyzed greenhouse gas regulation under the Clean Air Act, and "Fixing Regulatory Review" by Revesz and Livermore, which set out 10 broad review principles, including better coordination among agencies, enhanced transparency, and the maximization of net benefits. The report also gave line-by-line suggestions on how President Bill Clinton's 1993 executive order concerning regulatory planning and review might be updated.

"Fixing Regulatory Review" is based partly on concepts generated at a roundtable convened at the Law School last November. Participants, whose specific views were not necessarily reflected in the final report, included Rob Brenner, director of the EPA's Office of Policy Analysis and Review; Sally Katzen, the Office of Management and Budget's former deputy director for management; Nancy Ketcham-Colwill of the EPA's Office of General Counsel; Vickie Patton '90, deputy general counsel for the Environmental Defense Fund; and professors Richard Stewart and Katrina Wyman. IPI is hopeful that the report, written expressly to offer advice to the new president and delivered to strategic contacts in the Obama administration during the first 100 days, will be used to "re-imagine the structure of the federal administrative state." □

The Long Arm of State Law

JUSTICE JACK JACOBS OF THE DELAWARE Supreme Court depicted a complex patchwork of legal mandates when he gave the 2009 Justice William J. Brennan Jr. Lecture, "The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism."

Theoretically, Jacobs said, the 50 states' individual laws operate independently, with an overriding layer of federal law. "But as with much in life," he said, "the reality is more complex than the theory. And that's particularly true in the case of corporate law, because in that arena one state's corporate law will often acquire an extraterritorial reach that's at odds with the theory."

Jacobs traced the history of U.S. corporate law, which was virtually all local, he said, until the 20th century. The onset of the Great Depression prompted the United States to enact federal laws dealing with corporations, which had grown increasingly multistate, leading to potential jurisdictional conflicts. Statutes enacted by states beginning in the 1960s to regulate hostile takeover bids have led to conflicts in cases where one state's laws have significantly affected companies that incorporated in other states. For example, in *Edgar v. MITE Corporation*, a Delaware-incorporated Connecticut company successfully argued before the U.S. Supreme Court that the Illinois Business Takeover Act violated the Constitution's commerce clause. Another point of contention has been the internal affairs doctrine, which dictates that a corporation's internal affairs are governed by the laws of its state of incorporation. Since the majority of Fortune 500 and New York Stock Exchange–traded companies incorporate in Delaware, Jacobs said, the doctrine gives Delaware disproportionate clout in corporate legal proceedings.

The doctrine also conflicts with corporate outreach statutes. Enacted in states including California and New York, such statutes are meant to legislatively overrule the internal affairs doctrine and, in the case of California's statute, even amend a foreign company's articles of incorporation, Jacobs said. The ultimate question, he argued, is whether corporate outreach statutes or the internal affairs doctrine should prevail. □

Time for Maritime to Go Green

With the notorious *Exxon Valdez* spill 20 years in the past, and economic pressures mounting to keep costs ever lower, the maritime industry takes significant risks if vessels and crews fail to comply with environmental regulations. From ship owners to classification societies, no one has a free pass, said Judge Peter Hall of the U.S. Court of Appeals for the Second Circuit, in his lecture "On Notice: Why the Maritime Industry Must Embrace Environmental Responsibility," the Ninth Nicholas J. Healy Lecture on Admiralty Law, in April. Guests were welcomed to the event by John Kimball, adjunct professor of law.

Hall and Kimball

The lecture was launched in 1992 as a forum for the scholarly consideration of maritime law and to honor Healy, who died in May at the age of 99. An adjunct professor of admiralty law from 1947 to 1986, Healy was described as "probably the world['s]" finest admiralty lawyer by the *Journal of Maritime Law and Commerce* in 1991.

Former Prosecutor Looks for Guidance in Hip-Hop

PAUL BUTLER WAS ONCE A STAR FEDeral prosecutor at the U.S. Department of Justice with a near-perfect conviction record. Despite his professional success, he found himself troubled by his work. Speaking at the 13th Annual Derrick Bell Lecture on Race in American Society last November, Butler said, "I did not go to law school to put black people and Latino people in prison." As he became more concerned with inequities in the American legal system, Butler, now the associate dean for faculty development and Carville Dickinson Benson Research Professor of Law at the George Washington University Law School, found his views heavily informed by an unorthodox body of work. "If we listen to hip-hop," he claimed, "we can have a criminal justice system that works better."

In his lecture, "A Hip-Hop Theory of Justice," Butler used the lyrics of rap artists such as Nas, Jay-Z, and the late Tupac Shakur to offer insight into the often tense relationship between urban African-American communities and the criminal justice system. Rappers, he said, are a diverse group, but the one issue upon which there is consensus is dissatisfaction with law enforcement. While he conceded that some hip-hop does glorify criminal activities, Butler said he believes that more often the genre articulates a justified skepticism toward legal institutions. For example, he said, while African Americans constitute about 12 percent of drug users, 75 percent of those in prison for drug offenses are black. And nearly one-third of young black men in the U.S. are in prison, awaiting trial, or on parole.

The implications of such a high incarceration rate extend far beyond individual criminals. Families, relationships, and entire communities are suffering. In seeking a remedy for this collateral damage, Butler diverges from mainstream law enforcement. He proposes an alternative criminal justice system based on three main tenets of hip-hop justice: Those who harm others should be harmed in return; criminals are people who deserve love and respect; and communities can be hurt both by crime and by the criminal justice system. Butler emphasized the last point: "Punishment should be reduced when it harms people other than the criminal." Butler believes that a more socially conscious justice system is viable, but meanwhile he advocates the thoughtful use of jury nullification as a means for communities to avoid the social costs of locking up nonviolent offenders.

Butler concluded with a quote from an interview on Black Entertainment Television with then-President-Elect Obama: "Hip-hop is not just a mirror of what is. It should also be a reflection of what can be." □

Lawyers as Advocates

John Trasviña, president and general counsel of the Mexican American Legal Defense and Educational Fund, gave the inaugural Bickel & Brewer Latinos and the Law Lecture in February. In "National Immigration Policy in the New Administration," Trasviña, former special counsel for immigration-related unfair employment practices in the Clinton administration, called for more advocacy among immigration lawyers. "The nature of lawyering has changed," said Trasviña. "There needs to be much more advocacy—in front of state legislatures, in front of local city councils. It's cheaper and much more effective to win at the advocacy level rather than having to go into court."

The recent wave of local anti-immigrant ordinance efforts has been driven more by right-wing talk radio than by any real immigration spike in those localities, Trasviña said. An ordinance in Valley Park, Missouri, for instance, referred to the burden of illegal immigrants on local hospitals, even though the town has no hospital. Anti-immigrant rhetoric, he said, has also led to a record level of anti-Latino hate crimes.

Immigration affects everyone, Trasviña concluded: "It's important that we as lawyers, law students, and future lawyers provide the law and the facts to people so it gives them the ability to say, 'This isn't right. This is not what America stands for.'"

Sahrawi Gandhi Champions Her Cause

AMINATOU HAIDAR, THE 2008 ROBERT F. Kennedy Human Rights Award winner, gave a talk, "Forgotten in Transition? The Western Sahara and the Moroccan Transitional Justice Experience," as part of the Center for Human Rights and Global Justice's Transitional Justice Lunch Series last November.

Haidar, who advocates a referendum to settle the relationship of the Western Sahara territory with Morocco, its occupier since 1975, has a long history as a peace activist on the order of Mahatma Gandhi. After being arrested at age 21 for helping to organize a peaceful demonstration, Haidar was subsequently "disappeared" for four years and tortured by the Moroccan police. The Sahrawis, Western Sahara's inhabitants, have long endured such treatment; despite the International Court of Justice's rejection of Morocco's claim, Western Sahara has been deemed Africa's last colony. "As long as there is no decolonization," said Haidar, "we cannot talk about transitional justice." Since her release from detention in 1991, Haidar has worked tirelessly for the Sahrawis' right to self-determination. Amnesty International began to champion Haidar and her cause after her public beating by police during a 2005 demonstration, followed by seven months in prison.

Despite her brutal treatment, Haidar, often called the Sahrawi Gandhi, continues ▷

Doing Good and Well

Milgram prescribes public interest law as good for the soul.

A little more than a year after Anne Milgram '96 became one of the youngest state attorneys general in history, she reflected on her swiftly ascending public-service career path and encouraged Law School students to work for the greater good in her speech, "Public Interest as a Career," for the 12th annual Attorney General Robert Abrams Public Service Lecture last September.

Growing up in East Brunswick, New Jersey, in a family of teachers and police officers, Milgram learned early about the fulfillment found in helping others. She remembered how she would accompany her grandmother on visits to soup kitchens and orphanages on holidays when she was a child. Later, clerking for Chief Judge Anne E. Thompson of the U.S. District Court for the District of New Jersey, Milgram was convinced that the practice of the law could help her serve the public: "When you step into a courtroom, you get to see real wrongs being righted and justice being rendered right before your eyes." Milgram subsequently worked in the Manhattan District Attorney's office, where, as a member of the domestic violence unit, she handled the first case under a new antistalking statute.

Among her other career victories, she won some of the first prosecutions under the Trafficking Victims Protection Act of 2000, when she was the lead prosecutor for human trafficking cases at the U.S. Department of Justice's Civil Rights Division, and she secured the convictions of six defendants in the enforced prostitution case *U.S. v. Jimenez-Calderon*.

As New Jersey's chief law enforcement officer, she authored Governor Jon Corzine's major anticrime initiative to combat gang violence, bolster crime prevention, and reduce ex-convict recidivism. She has also grappled with problems as diverse as Internet safety, environmental laws, and mortgage fraud.

Milgram thrives on the challenges of her job. "I wake up every morning thinking about how I can improve the lives of people in the state, and that is a tremendous gift," she said. Urging her audience to act in the public interest, either full-time or through pro bono or volunteer work, Milgram vouched for the personal satisfaction public service has given her: "I wanted a job where I couldn't believe that someone would actually pay me to do work that I loved that much. And I will tell you the truth, that I've generally felt that I've had those jobs all along." □

to call for a referendum without resorting to violence. While gains have been made, the task of organizing for change is complicated by the Sahrawis' popular fear of government reprisals and the high illiteracy rate. Nevertheless, Haidar added, she remains optimistic: "I am convinced that my cause is a just cause. But what also gives me courage and hope is the determination of the Sahrawi people.... Even after 30 years of occupation and state terrorism, today there is a new generation of children who raise the Western Saharan flag in schools and say to their teachers, 'No, Western Sahara is not Moroccan.'" □

In addition to lectures by Milgram and Trasviña, other events in the Leaders in Public Interest Lecture Series were:

Solving Global Warming, Improving Our Economy Jim Marston '78, regional director, Environmental Defense Fund

Confronting Injustice Professor Bryan Stevenson, executive director, Equal Justice Initiative

Campaign for Fiscal Equity—Making the Right to a Sound Basic Education a Reality in Our Schools Geri Palast '76, executive director, Campaign for Fiscal Equity

Making a Difference and Realizing Professional Satisfaction: The Role of a Government Lawyer Michael Cardozo, corporation counsel, New York City Law Department

Mission Impossible: Making Governmental Proceedings Fundamentally Fair—Will You Accept This Assignment? David Raff '70, managing partner, Raff & Becker

U.S. Foreign Policy and Multilateral Engagement Spencer Boyer '95, director, international law and diplomacy, Center for American Progress

Public Interest Forum Jonathan Leibowitz '84, commissioner, Federal Trade Commission

Beyond Lawyering: A Holistic Vision of Public Defense Robin Steinberg '82, founder and executive director, Bronx Defenders

Advancing Immigrants Rights in the Post-9/11 World (While Raising Kids on Two Public Interest Salaries) Joanne Lin '97, legislative counsel, American Civil Liberties Union (ACLU) and Gregory Chen '97, director for legislative affairs, Lutheran Immigration and Refugee Service

Public Interest Cyber-Lawyering on the Electronic Frontier Fred von Lohmann, senior staff attorney, Electronic Frontier Foundation

The Future of National Security Professor Samuel Rascoff and Ben Wizner '00, staff attorney, ACLU

Defending Women's Rights Around the World: The Role of International Human Rights Law Luisa Cabal, director, International Legal Program, Center for Reproductive Rights

Scholarship in the Public Interest Professors Lily Batchelder and Randy Hertz, NYU School of Law

Simplifying Taxes in the E.U.

DESPITE THE EUROPEAN UNION'S GOAL OF a single market, multinational companies in the E.U. currently contend with numerous tax barriers, including the coexistence of 27 different tax systems, complex transfer pricing rules, a nearly absolute lack of cross-border loss-offsets, and a perplexing network of tax treaties. Needless to say, obstacles presented by the current tax treatment significantly impede cross-border economic activity. To clean up the current disarray, the Economic and Financial Affairs Council for the E.U. formed the Common Consolidated Corporate Tax Base Working Group, charged with proposing a single set of tax rules for corporations partaking in E.U.-wide activities. Last September, the former director of tax policy at the E.U. Commission, Michel Aujean, whose primary responsibility in office was to pave the way for a common corporate tax base, presented the working group's proposals at the 13th annual David R. Tillinghast Lecture on International Taxation, "Toward a Common Consolidated Corporate Tax Base in the European Union."

Aujean championed the working group's basic recommendations. Among them: a body of rules defining a common tax base, consolidation of profit or loss in accordance with the "all in or all out" principle, inclusion of passive income in the tax base, apportionment of that tax base among member states, and administration of the tax system by a single body. Aujean took pains to point out that the working group's opinions are nonbinding, and any decision related to tax matters requires unanimous approval of all 27 member states—not an easy feat considering the amount of tax revenue at stake. Eliminating tax obstacles to cross-border business activity, however, is a priority for many member states, and the working group's proposals will undoubtedly take a critical place in future debates. □

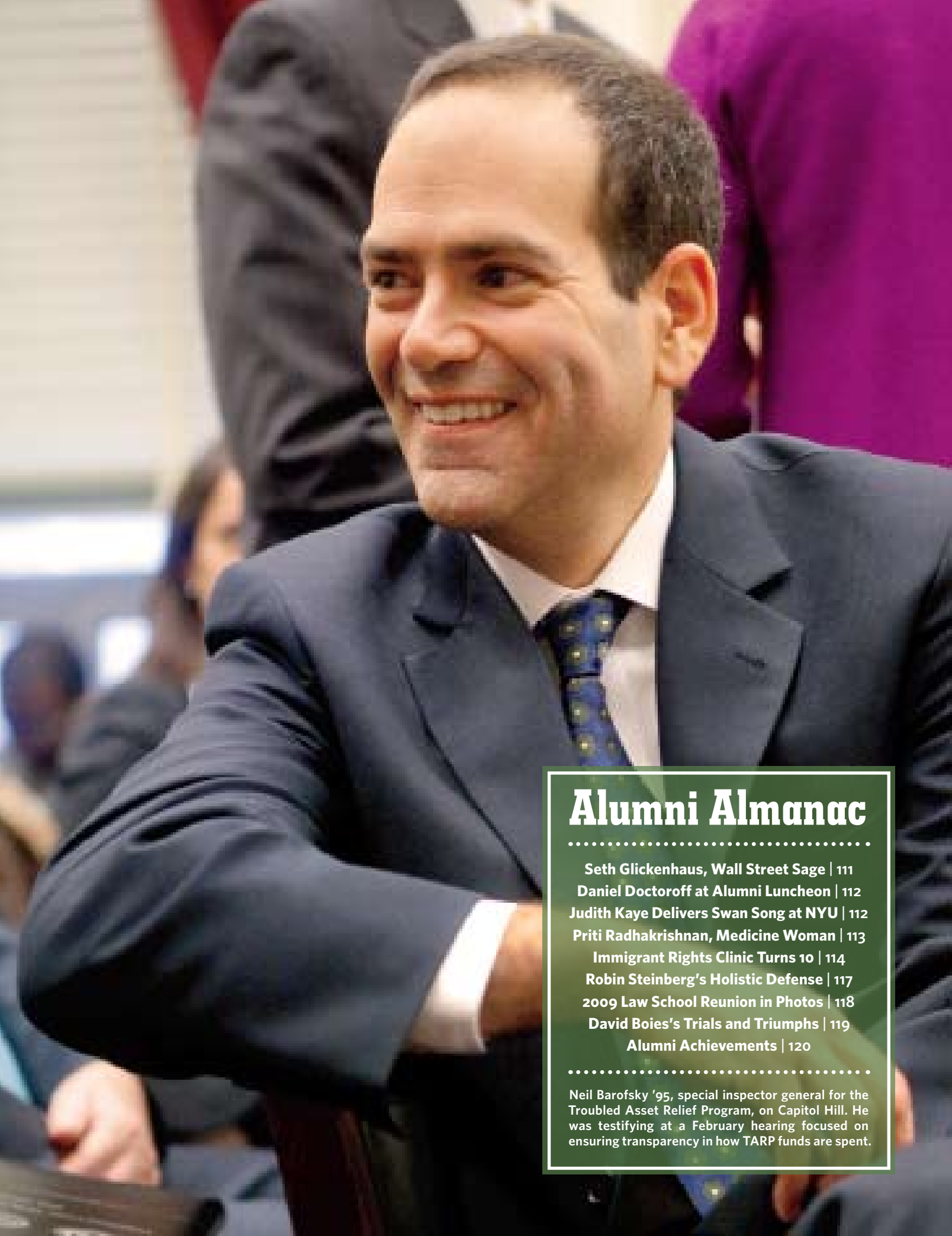
Notes from All Around

IDENTITY, RELIGION AND POLITICS Ruth Gavison, Haim H. Cohn Professor of Human Rights Law at the Hebrew University of Jerusalem Faculty of Law and founding president of the Metzilah Center for Zionist, Jewish, Liberal, and Humanist Thought, delivered the seventh annual Caroline and Joseph S. Gruss Lecture, "Jews and Israelis: Issues of Membership in the Jewish Religion, Jewish People, Jewish State," last March. In her speech, Gavison pointed out that not all Israelis are Jews: "Identities—Jews, Israelis—are complex, multifaceted, and very dynamic."

THE STATE OF THE EUROPEAN UNION Luís Miguel Poiares Pessoa Maduro, the advocate general of the Court of Justice of the European Communities, presented the fifth annual Emile Noël Lecture. Sponsored by the Law School's Jean Monnet Center for International and Regional Economic Law and Justice, the November event took the form of a fireside chat between the advocate general and Joseph Weiler, University Professor and Joseph Straus Professor of Law. The two deliberated over the Lisbon treaty, the perceived cultural divide between the United States and Europe, and the European Court of Justice.

AN ALLY'S PERSPECTIVE Last September, David Miliband, foreign secretary of the United Kingdom, and Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law, had a wide-ranging discussion forecasting the major challenges that would face the 44th U.S. president. Miliband described the importance of this administration, saying it was the "last chance for the transatlantic alliance...to set a global agenda" as the size and influence of non-Western nations grow over the next decade. On a lighter note, Dorsen recalled that he had met Miliband back in the 1960s, when Miliband was only three years old and his father, Ralph, was Dorsen's colleague at the London School of Economics. "When I looked at him more closely," Dorsen recalled, "I immediately said, 'He will go far.'"

Dorsen, NYU President John Sexton, Miliband



Alumni Almanac

Neil Barofsky '95, special inspector general for the Troubled Asset Relief Program, on Capitol Hill. He was testifying at a February hearing focused on ensuring transparency in how TARP funds are spent.

Way Up High: 2008 Weinfeld Gala at the Rainbow Room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SEPTEMBER 15, 2008
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WHERE YOU'LL FIND ME **1** Rebecca Sullivan and her husband, Stephen Greenwald '66 (LL.M. '95); **2** Barbara Chesler and Trustee Evan Chesler '75; **3** Enid Boxer and Life Trustee Leonard Boxer '63; **4** Trustees Rachel Robbins '76, Rita Hauser, who was presented with the Judge Edward Weinfeld Award that evening, Chairman of the Board Anthony Welters '77, and former Chairman of the Board Lester Pollack '57; **5** guests danced off dinner with a little night music; **6** Robin Fuchsberg and Trustee Alan Fuchsberg '79; **7** Dean Richard Revesz; **8** Lilia Toson-Dysvick '11, the gala's student speaker.

A Supreme Experience at the BLAPA Spring Dinner


APRIL 17, 2009
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AN APPEALING CHOICE **1** U.S. Circuit Judge Sonia Sotomayor was the featured guest speaker; **2** Eduardo Padro '80, BLAPA Board President Edward Rodriguez '97, Richard Brand '07, and Tiennhan Phan; **3, 4** Distinguished Service honorees Joseph Scantlebury '92 of the Bill and Melinda Gates Foundation and Keith Harper '94 of Kilpatrick & Stockton.

PREVIOUS PAGE: GETTY IMAGES/ BRENDAN HOFFMAN / STRINGER

A Life on the Street

Taking the long view, Seth Glickenhaus, who worked at Salomon Brothers in 1929, is optimistic about the recession.

The Great Depression seems a succession of iconic images and moments: *Variety*'s 1929 headline: "Wall Street Lays an Egg"; Hoovervilles in Central Park; Franklin Delano Roosevelt declaring the nation had nothing to fear but "fear itself."

But Seth Glickenhaus '38 has a single, searing memory: When he was a 16-year-old freshman at Harvard College in 1930, Glickenhaus was surprised to arrive home to find his father, Morris, downcast. An insurance broker, his father had just fired a longtime employee. "He'll get another job, won't he?" Glickenhaus said. His father, not a man given to emotion, wept.

Now 95, Glickenhaus has been besieged by business reporters seeking the perspective of someone who worked on Wall Street during the Great Depression. They want his insight into the economic crisis and are frankly astonished that someone of his years is still working. Glickenhaus sets aside weekdays at 4:15, after the market closes, just for media interviews.

When Glickenhaus sat down to talk in his midtown Manhattan office on an overcast day last November, the market, after weeks of free fall, was up. He wore a brown sweater, gray pants, and eyeglasses the size of oranges. His thin white hair was swept back on his head. Though he walked slowly, in tiny steps, his voice was strong, his hearing good, and his opinions tart.

When investment bankers today take tens of millions of dollars in fees, "that, to me, is Al Capone with a high hat," said Glickenhaus, senior partner and chief investment officer of Glickenhaus & Co. Just as bad in its way is the business press, he said. "The media has so emphasized the negative, that the market has made a low that will stand for some time even though we are in for only a year or two of recession." The country has deeper problems than it had during the Depression, he acknowledged. But unlike that time, when government failed to act quickly, Glickenhaus said, "governments—both ours and in Europe and in Asia—are throwing so many trillions at the problem that the recession will not be very deep or very long."

He singles out one Wall Street player for criticism: the credit-rating agencies, like Moody's Investors Service and Standard & Poor's. Analysts say their sunny ratings of mortgage securities helped lead to billions of dollars in losses. But Glickenhaus thinks the agencies will never get it right. They "look at the past and the present, without making a real effort to look into the future because that's more subjective." He frowned. "So the day after a triple-A bond defaults, they downgrade it!" he said, laughing.

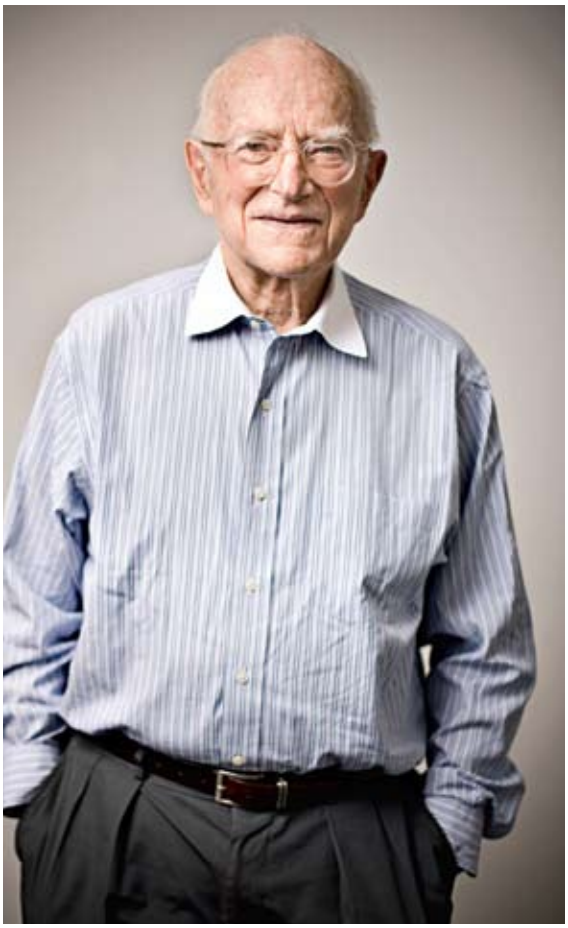
Glickenhaus's skepticism toward Wall Street began in the summer of 1929 when he worked as a teenage errands "runner" for Salomon Brothers & Hutzler (now Salomon Brothers, part of Citigroup). He was chided by his boss for doing his job too quickly as longer tasks paid better. "The word was 'stall,'" he said. "You were supposed to take twice as long. You could get a cup of coffee, you could get your shoes shined. I was appalled."

Nonetheless, after Harvard, where he concentrated in economics because of the stock market crash, he got a job as a bond trader at Salomon in 1934. In the days before computers, bonds were an arcane market. "If you had a good memory" for bond yields and financial minutiae, he said, "you could make a good living."

But he wasn't making a good living: He earned only $48 a week, a small sum even then. He had decided to hedge his career bets by going to New York University School of Law at night, graduating in 1938. That year, however, he and a friend, Lawrence Lembo, founded their own small securities firm, Glickenhaus & Lembo. And he never looked back. He worked at the firm until World War II intervened. "As an American and a Jew, I felt I owed it to myself to shoot Nazis."

Alas, it was not to be. Despite being assigned to what became the legendary 10th Mountain Division, the Army's white-clad ski soldiers, he spent much of the war training other troops and learning a foreign language. Still, he gained a wife, having met a pretty speech therapist, Sarah Brody, while studying Norwegian at the University of Minnesota.

He returned to Wall Street and struck it rich after a lucrative bond deal in 1959. He and Lembo retired. He was in his 40s, however. So, in a midlife crisis, Glickenhaus decided on his version of a cherry-red Corvette: He wanted to become a doctor. After brushing up on sciences at Columbia, he was admitted to Albert Einstein College of Medicine, but reconsidered matriculating when he realized the toll years more of training would take on his marriage and his then-teenage children, Jimmy and Nancy.



EVAN KAFKA

Today, Glickenhaus & Co., founded in 1961, is small by Wall Street standards, managing $1 billion for high-net-worth clients. Glickenhaus is one of only five senior managers making investment decisions.

He snorts at the inevitable question of the secret to long life: "The right genes and a wife who makes sure you live sensibly." He exercises regularly, sleeps nine or more hours a night, and eats a Mediterranean diet.

Any parting advice? Don't follow icons, he said. "If Warren Buffet is doing something, people want to do it," he said. "Think for yourself, or else the world will really foul you up!" □ *Anthony Ramirez*

A View from the Roller Coaster

No stranger to dramatic changes, Daniel Doctoroff, president of Bloomberg L.P. and former deputy mayor for economic development and rebuilding in New York City, tossed away his planned remarks for the January 30 Annual Alumni Luncheon. His original topic, "Private to Public to Private Again," became "Planning Through Panic."

"My entire career has essentially been shaped by the four major economic downturns of the last 30 years," Doctoroff said. For the record: Graduating Harvard University at the start of the 1980 recession, he ducked into the University of Chicago Law School (although he transferred to NYU Law for his third year). Two months after he left Lehman Brothers in 1987 to form Oak Hill Capital Partners, an investment partnership focused on leveraged buyouts and junk bonds, Black Monday struck (his partnership bailed out American Savings Bank, the nation's largest failed thrift, selling it years later for a 70-fold return on its investment). Just weeks after 9/11, Doctoroff signed on as deputy mayor of New York City, when the economy was in shambles and the municipal government in dire straits. He would spearhead the ultimately unsuccessful bid for New York to host the 2012 Olympics. Finally, in January 2008, he became president of the financial information company Bloomberg, only to see the economy collapse yet again.

The Big Apple itself, Doctoroff explained, offers a perfect model for study: "New York was literally formed by the rhythm of boom and bust." Rattling off a dozen names of past crises since the Panic of 1809, Doctoroff observed that, with the exception of two postwar recoveries, every upturn has been fueled by major innovation.

"The reason New York City will survive this crisis—I believe without a significant diminution in our quality of life—is because when times were good we didn't spend all of our resources. We invested wisely, but we put money away," said Doctoroff, who oversaw a shift from a nearly $5 billion city budget gap in 2002 to a $5.5 billion surplus in 2006, when the city placed $2 billion in trust for city retirees' health benefits. "Investing aggressively in the bad times and being prudent in the good times is a strategy that proves successful over and over again." □

Farewell to the Chief

Judith Kaye '62 decided that her last state-of-the-judiciary speech as New York's chief judge should be delivered at NYU rather than in Albany, bucking tradition to reach a larger audience and to give a nod to her alma mater. Kaye used her power to the last minute; she postponed her address, usually given in February, until November to protest the state legislature's refusal to raise judges' pay. The 10-year salary freeze was Kaye's biggest disappointment on the bench.

Calling her quarter century on the Court of Appeals (the last 15 as chief judge) "the role of a lifetime," Kaye led the audience on a whirlwind tour of the state's judicial system. She began by reviewing efforts to improve child welfare proceedings and hire more judges in the overburdened family courts, before moving on to the state of civil justice, which has been affected dramatically by the nation's current financial crisis—some counties' housing courts have seen 200-percent increases in foreclosure cases. Kaye also discussed one of her most-lauded achievements as chief judge, jury reform, calling the American jury system "a rare opportunity to show the public firsthand a justice system that is modern, up-to-date, effective, and efficient." In 1996 Kaye famously eliminated professional exemptions, compelling notable figures like former mayor Rudolph Giuliani '68, newscaster Dan Rather, actor Robert De Niro, and even Kaye herself to show up for jury duty. Her legacy also includes a host of initiatives tackling domestic violence, drug abuse, and mental health through the courts. And it was Kaye who broke the New York judiciary's glass ceiling: The first woman to serve on the state's highest court, let alone lead it, she left it with a female majority.

THE JUDGE WORE RED Kaye received a standing ovation at her last public address as New York's chief judge. A few weeks later, Jonathan Lippman was named her successor.

Throughout her speech, and particularly as she concluded her remarks, Kaye thanked many of her colleagues, especially Jonathan Lippman '68, now Kaye's successor, who was then still the presiding justice of the Appellate Division. Kaye, the longest-serving chief judge in the history of the post, deemed it "a privilege beyond description to labor in the cause of justice alongside the greatest people on earth."

JUDITH KAYE: AP PHOTO/BEBETO MATTHEWS

Medicine's Robin Hood

Priti Radhakrishnan gives the poor access to lifesaving drugs.

With one grandfather a union organizer in the United States and the other a political journalist in India, Priti Radhakrishnan '02 has activism in her blood. So it came as little surprise when she left a high-paying job at L.A.'s McDermott Will & Emery after just one year to take an internship, with a stipend from the Center for Human Rights and Global Justice, at the World Health Organization. Six months later she was off to Delhi to work at the Lawyers Collective, where she became an expert at patent intervention, scrutinizing and challenging patent applications.

Radhakrishnan, now 31, arrived in India at a crucial time for its pharmaceutical industry. Upon joining the World Trade Organization in 1995, India was required to enact patent legislation by 2005. Patents offer pharmaceutical companies a 20-year period of exclusivity to manufacture and sell their inventions. But too often, Radhakrishnan argues, the companies make only minor changes to drugs whose patents are about to expire, then apply for patents to essentially extend their monopoly for another 20 years. "They're gaming the system," she said, causing profound hardship on the poor in developing nations where generics are the only affordable drugs. WHO predicts that 10 million lives could be saved yearly with more access to medicines. "That's the injustice that drives me," she added.

In May 2006, Radhakrishnan, along with her husband, Tahir Amin, 37, an intellectual property soliciter, launched I-MAK (Initiative for Medicines, Access & Knowledge) to take on pharmaceutical companies. "We're not anti-patent, we're anti-undeserved patents," said Radhakrishnan. Doing much of their work in Internet cafes and on airplanes as they fly from one developing nation to another, the two rely on a small team of scientists and lawyers to selectively review and expose unmerited patents. Arguing on the basis of scientific validity, such as newness, usefulness, and inventiveness, I-MAK has challenged patents dozens of times and has won at least two battles.

In June 2008 after an I-MAK challenge, the Indian Patent Office denied Boehringer Ingelheim's patent application on a syrup version of a pediatric anti-HIV drug that already existed in tablet form. In 2007, GlaxoSmithKline withdrew a patent application and cut the price of an adult anti-HIV drug a year after I-MAK prepared a challenge. "Until we intervene, and impoverished patients take on the additional burden of filing legal cases, these companies don't seem to care about access," said Radhakrishnan.

The pharmaceuticals see it differently. "Incremental improvements are not desperate moves to extend patent life," says Ken Johnson, senior vice president of PhRMA, a membership organization that includes the leading pharmaceutical companies. He argues that, for example, creating a shelf-stable form of a drug that otherwise would require refrigeration, which is largely unavailable to the world's poor, is a significant advance.

KRIS KRUG

In 2008, Radhakrishnan and Amin won a $90,000 fellowship from Echoing Green, which invests in and supports budding social entrepreneurs. Radhakrishnan also was awarded a Social Innovation Fellowship by Pop! Tech. Gregg Gonsalves, a patients' rights advocate, said, "She's part of a small corps of people worldwide that have used legal strategies to expand access to lifesaving drugs to millions of people. There are not many lawyers of her generation who have made such an impact."

Radhakrishnan grew up in Fremont, California. She traces her passion for science to her father, an Indian immigrant who completed his postdoctorate work in pharmaceutical science at MIT and has worked at Bay Area drug companies for the past 25 years. She recalls spending early childhood dinners listening to her dad and 1968 Nobel Laureate H. Gobind Khorana "fiercely discussing scientific theories and breakthroughs." While her friends decorated their rooms with posters of teen heartthrobs, she had a huge laminated periodic table of elements—a gift from dad.

Radhakrishnan got involved in social activism, raising awareness about domestic violence, at the University of California, Berkeley. Graduating in 1999 with a B.A. in political science and international relations, she entered NYU Law. "At orientation, the dean told us that we were a family. I don't think I realized that this incredibly supportive community would actually end up changing my life," she said. One course that made a deep impression was Professor Holly Maguigan's seminar, Comparative Criminal Justice—Focus on Domestic Violence. "She was truly engaged and a wonderfully iconoclastic thinker," said Maguigan. Once, she walked into class wearing gigantic overalls, Maguigan recalled. The slight and soft-spoken Radhakrishnan explained that how you dress affects how you sit and ultimately how you would conduct yourself in the classroom.

Over the next three years, Radhakrishnan and Amin, based in New York City's Upper West Side, plan to build a free online database that will track pending patents on drugs for the most common diseases in the developing world such as HIV/AIDS, hepatitis, and malaria. Since that information is usually costly, "we are leveling the playing field for patients and the public by making the system more transparent," she said. They will also take time out for Salsa and Samba lessons. Doing increasingly more work in Latin America, they're often taken to dance clubs. "We felt like we had two left feet," says Tahir. "We want to get this right, so we've chalked it up on our board as a must-do." □ *Jennifer Frey*

Putting Down Roots

Former students and teachers gather to celebrate a decade of ensuring fair treatment for immigrants.

Professor Nancy Morawetz '81, founding director of the Immigrant Rights Clinic, confessed "a little embarrassment" at the flood of tributes she received last March when half her 150 former clinic students met to celebrate the IRC's 10th anniversary and to share lessons learned in advancing social justice for a largely defenseless population. "The dream was there," said Morawetz, as she reflected on the clinic's genesis in an interview, "but there was no way back in '99 that we could have completely envisioned where our work would take us."

Ten years later, the destination includes the highest court of the land. Morawetz and her small but strongly idealistic army of law students were involved in the bulk of immigration matters before the U.S. Supreme Court over the past decade. Even after graduating, many clinic alumni have stayed in the field. Now as practitioners, they are fanned out across America and points overseas to apply the clinic's formula of legislative effort, community advocacy, and media outreach in addition to impact litigation. (See "The Hard Line on Immigration" on page 24.)

This year, for instance, students Andrea Gittleman '09 and Sara Johnson '09 drafted an amicus curiae brief to the high court on behalf of the Supreme Court Immigration Law Working Group, a coalition of major immigrant rights organizations monitoring the pending matter of *Flore-Figueroa v. U.S.* In their brief, and in strategy assistance given to plaintiff counsel, Gittleman and Johnson argue that workers who submit to employers falsified documents containing randomly created Social Security numbers should not be subjected to the "aggravated identity theft" penalty that warrants a mandatory two-year jail sentence.

The clinic's agenda has expanded far beyond NYU Law as some who have co-taught alongside Morawetz have replicated the program at Yale Law School, the City University of New York School of Law, and the University of Texas at Austin School of Law. Recently, IRC alumnus Peter Markowitz '01 launched an immigrants' rights clinic at the Benjamin N. Cardozo School of Law.

Isaac Wheeler '03, today a staff attorney at the Bronx Defenders, spoke for his fellow celebrants in explaining Morawetz's continuing influence. "Whenever I think, there's no way, no chance for this case, I hear Nancy's voice saying, 'Oh, you can do this!'" said Wheeler. "I am forever warped," he added. "So thanks, Nancy."

Rachel Rosenbloom '02 spoke of doubt on first exposure to Morawetz's fierce view that young lawyers have a responsibility to accept the growing needs of immigrants, especially in a post-9/11 climate hostile to them. "In class, I would secretly wonder—is she crazy?" said Rosenbloom, a former supervising attorney at the Post-Deportation Human Rights Project at the Center for Human Rights and International Justice at Boston College. "But I've learned that being a graduate of Professor Morawetz's clinic means that in the world of criminal deportation, doors open anywhere in the world."

Enthusiasm for the clinic is perhaps best demonstrated by Alina Das '05, an IRC alumna who became Morawetz's co-teacher in 2008. "I remember thinking after my year as a clinic student, wouldn't it be great to do this forever?" said Das. "So, it's been great getting a job here." Mayra Peters-Quintero '99, now a program director of migrant and immigrant rights at the Ford Foundation and Morawetz's former co-teacher from 2004 to 2008, graduated the spring before the clinic was begun. ▷

Who's Who in the U.S. Financial Bailout

All hands on deck! In the aftermath of the global financial meltdown, lawyers and judges with expertise in such areas as fiscal policy, bankruptcy, investment banking, mediation, and mortgage lending have been called into service. Herewith is a diverse group of alumni who have been involved in helping to right the U.S. economy.

Neil Barofsky '95, special inspector general of the U.S. Treasury's Troubled Asset Relief Program, is responsible for overseeing Congress's emergency bailout plan for the financial industry.

James Clarkson '69, director of regional office operations in the SEC's Division of Enforcement in Washington, D.C., served as acting regional director of the SEC's New York office from October 2008 to June 2009.

Eric Dinallo '90, superintendent of the New York State Insurance Department from 2007 to 2009, stabilized the bond-insurance industry and played a key role in the bailout of AIG.

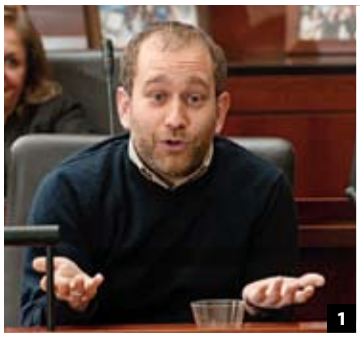
James Duffy '75 was appointed interim CEO of NYSE Regulation in March after serving as executive vice president and general counsel since 2006.

Dennis Dunne '90, leader of the restructuring group at Milbank, Tweed, Hadley & McCloy, heads the firm's team representing the creditors' committee in the Lehman Brothers bankruptcy.

Morawetz spoke of the clinic's ongoing efforts in navigating what she terms the "horrible process" of alien detainment and deportation hearings in accordance with the Illegal Immigration Reform and Immigrant Responsibility Act.

Luis Gutierrez, blindsided by an especially draconian application of that 1996 federal statute, was represented by clinic students in his long struggle for habeas corpus relief after being deported to his native Colombia—a struggle that included being "ripped off," as he put it, by an ineffective private attorney. Gutierrez, one of a few former clients invited to the reunion, offered his thanks to the dozens of students who helped him from 2000 to 2007, when he returned to the United States as a free man. "I had lost all hope of justice," said Gutierrez, now working as an electrician in Jersey City and reunited with his American-born daughter. "But then I found this clinic."

Morawetz, admitting inability to imagine an eight-year separation from her own two children, said of the Gutierrez case, "He suffered terribly. His marriage was destroyed. You can't make somebody whole again. All that pain and anguish, yet he's the happy story." □ *Thomas Adcock*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DEFENDERS OF THE POWERLESS **1** Peter Markowitz '01; **2** Alisa Wellek '10, Maribel Hernandez '10, Julia Dietz '10, Andrea Gittleman '09; **3** Joanne Lin '97, Melissa Goodman '03, and Omar Jadwat '01; **4** Alina Das '05; **5** Jenn Ching '00, Maya Nath '04, and Tony Lu '02 (looking down); **6** Past and present students of the Immigrant Rights Clinic, 1999 to 2009.

Kenneth Feinberg '70 was appointed compensation overseer by the Obama administration in June 2009. His job: to set pay for executives at companies that received federal bailout money.

Matthew Feldman '88 joined the Obama administration's Auto Industry Task Force in March 2009.

Judge Arthur Gonzalez (LL.M. '90) of the U.S. Bankruptcy Court for the Southern District of New York was selected to preside over the Chrysler bankruptcy.

David Kamin '09 was appointed special assistant to Peter Orszag, director of the Office of Management and Budget, in January 2009, the same month he received his J.D.

Richard Ketchum '75 is CEO of the Financial Industry Regulatory Authority. Until March 2009, he was the CEO of NYSE Regulation.

B. Robbins Kiessling '76, banking practice leader at Cravath, Swaine & Moore, advised the consortium of banks providing Lehman Brothers with liquidity.

Timothy Mayopoulos '84 became executive vice president, general counsel, and corporate secretary of Fannie Mae in April 2009. He had been executive vice president and general counsel of Bank of America.

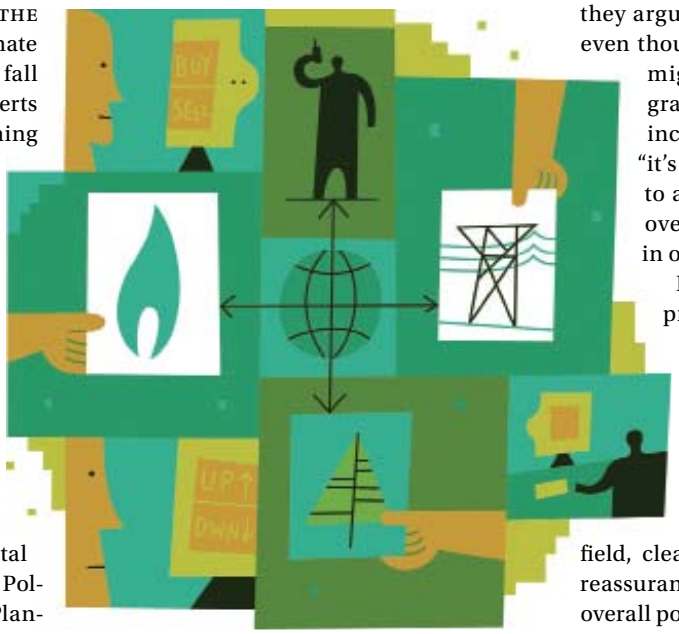
Lee Meyerson '81 is head of Simpson Thacher & Bartlett's financial institutions practice, which advised the Treasury Department on structuring the Troubled Asset Relief Program.

Judge James Peck '71 of the U.S. Bankruptcy Court for the Southern District of New York was selected to preside over the Lehman Brothers bankruptcy.

Bradley Smith '74 led the Davis Polk & Wardwell team representing the Treasury and the Federal Reserve Bank of New York in the AIG bailout negotiations.

Lean, Green, and Ready

Environmentalists focus on averting the worst effects of global warming in a dramatically changed economic climate.



It quickly became clear at the Law Alumni Association's climate change panel discussion last fall that among environmental experts the goal of mitigating global warming has overtaken the dream of prevention. "A significant amount of damage is already baked in," said Daniel Lashof, director of the Climate Center at the Natural Resources Defense Council. "Now we have to adapt and avoid the worst consequences." But in the midst of a global financial crisis, it was no surprise that the panelists held competing views on who should pay and how to lower carbon emissions.

The panel, called "Environmental Law and Climate Change: Public Policy, Corporate Strategies, and Planning for the Future," was moderated by Dean Richard Revesz and inaugurated the Law School's Frank J. Guarini Center on Environmental and Land Use Law. In addition to Lashof, the invited experts were Stuart Barkoff, managing director of the Global Environment Fund; Michael Livermore '06, executive director of NYU Law's new Institute for Policy Integrity; and University Professor Richard Stewart, director of the Guarini Center.

Both Lashof and Livermore pressed for a national comprehensive plan to price carbon to replace our current piecemeal legislative actions. They each favor a cap-and-trade scheme that would provide an incentive for energy companies to reduce emissions and increase efficiency. This, they argue, could lower consumers' bills even though the price of a kilowatt hour might go up. Coupled with programs specifically targeted at lower-income Americans, said Livermore, "it's a smarter policy that allows us to address climate change without overburdening the disadvantaged in our society."

Barkoff added that from the private investment perspective, what is necessary is consistency and certainty in regulation—a policy that would bring clarity to the competition between traditional and alternative sources for energy. Even if regulations do not level the playing field, clean-energy investors need some reassurance that there is some stability in overall policy.

Though they had their differences, the panelists were able to agree on one thing: that the costs of moving to a lower-carbon economy will be high. The alternative, however, is a price no one would want to pay. □

Mutual Appreciation: Scholarship Donors and Students Meet

POSITIVE RECEPTION **1** C.V. Starr Scholar Jason Richman '11, C.V. Starr Scholar Matthew Nazareth '11, and Hauser Starr Scholar Alamo Laiman (LL.M. '09) with Starr Foundation President Florence Davis '79; **2** AnBryce Professor of Law Deborah Malamud, AnBryce Scholar Lilia Toson-Dysvick '11, and Trustee Anthony Welters '77, founder of the AnBryce Scholarship Program; **3** Bickel & Brewer Scholars Thomas Fritzsche '09, Andrea Nieves '10, Alba Villa '11, Maribel Hernandez '10, and Melissa Navarro '09, with Deidre Cousman; **4** Evan Chesler Scholar Athena Bochanis '11 and Cravath, Swaine & Moore Scholar John Leo '10 with Barbara Chesler and Trustee Evan Chesler '75; **5** George T. Lowy Scholars Jonathan Crandall '10 and Gabriel Armas-Cardona '11 with Trustee George Lowy '55; **6** Keren Raz '10, recipient of the Root-Tilden-Kern Jacobson Public Service Scholarship for Women, Children, and Families, with Kathy Jacobson and Marne Lenox '11, Jacobson Family Scholar

Another Bronx Tale

Robin Steinberg passionately believes that effective legal defense for the poor includes a good dose of social work.

Never say something is impossible to achieve around Robin Steinberg '82; it will only motivate her to prove you wrong. The 51-year-old founder of the Bronx Defenders, a unique non-profit public defense group in the Bronx, always steps up to a challenge. "When someone says, 'Oh you can't,' nothing lights a fire under my behind more than that," she said with a laugh over a bowl of steaming oatmeal at an Upper West Side café.

That spirit drove this public defender to find a more comprehensive way to represent people thrust into the criminal justice system. Enter the Bronx Defenders. Founded in 1997 with the help of a city grant, the Bronx Defenders tackle the broader economic and social contexts that affect their clients—from immigration status to child welfare issues. It's an approach that turns the traditional public defense system on its head. "Public defenders only focus on the circumstances of the arrest and have no idea about the other areas in a person's life that may have destabilized them to begin with," Steinberg says. "We ask the broader questions: Are you receiving public aid? What's your immigration status? Where are your kids? Nobody asks these kinds of questions. We do. Our job is to counsel and represent the human being. We try to get to know them, understand them, and make sure that what's good about them is understood."

During the last decade or so, Steinberg has assembled a diverse staff of criminal defense, housing, immigration, family law, employment, and civil rights lawyers, social workers, parent advocates, investigators, public benefits specialists, community organizers, and administrative staff—120 in all. The Bronx Defenders Web site profiles every one of them, even the janitor. According to Steinberg, her organization assists some 14,000 people annually with everything from navigating the criminal justice system to housing and health issues. "She is truly a visionary," says Justine Olderman, managing attorney at the Bronx Defenders, decrying what she calls the "cookie-cutter approach" to criminal defense.

Clients arrive at the Bronx Defenders' doorstep through the criminal and family courts. The office also gets lots of walk-ins, who sometimes only want to do something as simple as making a copy of a document. The office always obliges. And all clients, no matter what the request, are made to feel comfortable. A bright reception area, filled with couches, plump pillows, an assortment of toys, telephones, and free coffee, welcomes them. "I've put a lot of thought into our physical space. We want our clients to feel that this is a place they can trust and where they feel safe," she says, with a hint of pride in her voice. "Every client deserves to be treated with compassion and dignity."

Likewise, Steinberg insists that every client served by the Bronx Defenders leaves feeling that his or her story has been heard, regardless of the outcome. "Sometimes the case is so strong, you can't stop the train," she says. "But at the end of the day, I tell my staff, if all you can do is enable your clients to believe that their dignity has been preserved and you have shown respect for them, then you've succeeded." She underscores her point, as she sips her coffee, adding, "Some of my biggest fans are doing life in prison."

It's not difficult to see why Steinberg has fans. She's a sincere woman with genuine conviction. You believe her when she talks about how she wants to help people who have been mistreated by a system that she considers heartless and complacent. Her smile is warm and endearing, her enthusiasm, contagious. She chuckles and confesses that she can't walk by someone asking for money without giving them a few coins. "I always look them in the eye and ask them how they're doing," she says, a habit that has prompted her 13-year-old daughter to call her "the nicest person she's ever met." Her daughter has a point. Steinberg, a native New Yorker, is the kind of do-gooder that makes you want to empty your pocket for the next homeless person you run across.

Steinberg didn't always think law was the way to accomplish her goals. At the University of California, Berkeley, in the 1970s, she majored in women's studies. Her ambition, even then, was a lofty one: She wanted to change the world. Eventually she came to think she could do that by becoming a lawyer and advocating for women's rights, so she applied to NYU and made her way back to her hometown. At first, law school wasn't quite as inspirational as she'd imagined. "I was hardly a stellar law student," she laughs. "I sat in the back row and did not participate." As she put it when she received her Alumna of the Year award from Law Women last February, "Don't underestimate the power and the passion of the quiet students in the back row trying to stay unnoticed." In her second year, Steinberg took a criminal defense clinic that involved helping women in a maximum-security prison in Bedford, New York. "I literally spent the year getting to know women and listening to their stories," she says. She was hooked. Today, she's still listening to clients who want to be heard—and in the process, she's achieved a sliver of her goal: She is changing the world, at least in her own corner of the Bronx. □ *Dody Tsiantar*

Pack Your Books—and Your Dancing Shoes

APRIL 3-4, 2009

The 2009 Reunion featured four engaging panel discussions on the Washington Square campus and a reception at the Waldorf-Astoria Hotel. Panels included: "Reform of the Reform? What the New Congress and Administration Will Mean for Bankruptcy Law," moderated by Assistant Professor of Law Troy McKenzie '00; "The Meltdown of 2008: Causes, Cures and Consequences," moderated by John C. Coates IV '89; "Tax Policy in the New Administration," moderated by Professor of Law Lily Batchelder; and "Rethinking the Mortgage Finance Industry After the Foreclosure Crisis," moderated by Boxer Family Professor of Law Vicki Been '83.

A Top Gun Shoots from the Hip

By anyone's reckoning, David Boies (LL.M.'67) has had a highly successful legal career. At Cravath, Swaine & Moore, he successfully defended IBM from antitrust action, persuaded General William Westmoreland to drop his libel suit against CBS, and made partner at 31. Boies left the firm in 1997 to start Boies, Schiller & Flexner, which counts as clients American Express, DuPont, and NASCAR. Nonetheless, he has never forgotten the one that got away: *Bush v. Gore*.

Boies recalled the infamous Supreme Court case, which he argued on Al Gore's behalf in 2000, at a roundtable last spring hosted by Dean Richard Revesz. "Every lawyer is used to losing cases, but it's tough when you lose the whole country," Boies said, calling the defeat "particularly frustrating and disappointing" because the Florida courts had been receptive to Gore's arguments. Boies described those tense post-election days for a rapt audience of students. While the Court stipulated that its decision should not be used as precedent, Boies likened the case to a landmine: "People sometimes even forget it's there, but in the right circumstances it can blow something up." He predicted we may not have heard the last of *Bush v. Gore*. "It could come back to haunt some of the ideological conservatives who thought it was a good idea at the time."

Boies is no stranger to politics. He served as chief counsel and staff director to both

the Senate Antitrust Subcommittee and Judiciary Committee in the 1970s, and as counsel to the Federal Deposit Insurance Corporation in the 1990s. In 1997, he won the closely watched *United States v. Microsoft* antitrust case as the Justice Department's special trial counsel. (See page 4 for news on Boies's latest headline-grabbing suit.)

That high-profile case undoubtedly helped to fuel the extraordinary growth of Boies's three-lawyer boutique into a 240-attorney behemoth. Despite its size, Boies still believes that less is more. "Size is really an enemy," he said. "But it's a necessary evil because if you're not growing, you're not going to be able to continue to have the very best lawyers, and having the very best lawyers is the way you keep the very best clients."

Roundtable Guests

During 2008-09 Dean Richard Revesz also invited these prominent alumni to intimate luncheons with students.

Sean O. Burton '97
President and COO, CityView

Robert Holmes '69
former Executive Vice President, Sony Pictures Entertainment

Max M. Kampelman '45
former Counselor, U.S. Department of State

Jared Kushner '07
Owner, *New York Observer*

Edgar A. Lampert '65
President, The Georgetown Company

Ivan Ross '86
Managing Director, Goldman Sachs & Co.

Boies, who suffers from dyslexia, does not use notes when arguing in court, but can still cite cases from memory, down to the page number. And despite being a formidable trial lawyer, he confessed that he had his heart set on teaching; he was an adjunct professor at NYU Law for six years. "I enjoy the law," he said. "There's almost no aspect of it that I don't enjoy." □

All Aboard: Recent Graduates Party at Grand Central Station

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IN TRAINING **1** Sipping cocktails at Metrazur, in Grand Central Station's iconic great hall; **2** Anna Hutchinson '04, Jade Hon '04, and Kelvin Chen '04; **3** Daniel Blaser '06, Lisa Ahdoot and Jonathan Ahdoot '06; **4** Eugene Kowel '01 and Fernanda Ramo

Honor Guard: NYU Law Lauds Outgoing Board Chair

THANKS, AND HELLO **1** Anthony Welters '77 honored Lester Pollack '57 for his tenure as chair of the Board; **2** Fried, Frank, Harris, Shriver & Jacobson partner and new trustee Jonathan Mechanic '77; **3** Minnesota Vikings owner and new trustee Mark Wilf '87

Stepping Out in Beverly Hills

Charles P. Rettig (LL.M. '82) of Hochman, Salkin, Rettig, Toscher & Perez hosted a tax law alumni luncheon with guest speaker Terence Cuff (LL.M. '79).

London Exchange

Cocktail reception host Lady Barbara Judge '69, chairman of the UK Atomic Energy Authority, with guest Charles Hawes '97.

Applause, Applause: Notable Alumni Career Highlights

Law Trustee Sheila Birnbaum '65 was awarded an honorary Doctor of Laws from Hunter College in 2009.

Yaakov Neeman (LL.M. '65, J.S.D. '68) was sworn in as Israel's Justice Minister in March. He previously served as director general of Israel's Ministry of Finance.

Daniel David Ntanda Nsereko (LL.M. '71, J.S.D. '75) was sworn in as a judge of the International Criminal Court in January 2008.

Marc Marmaro '72 and **Richard Marmaro '75** were inducted into the American College of Trial Lawyers, the first time brothers have been inducted at the same time.

James Clark '73, a partner at Gibson, Dunn & Crutcher in Los Angeles, has become an American College of Trial Lawyers fellow.

Susan Herman '74 has been elected president of the American Civil Liberties Union.

Peter Neufeld '75, co-founder of the Innocence Project, was given the University of Virginia's Thomas Jefferson Medal in Law.

Tongthong Chandransu (LL.M. '80) has been named secretary general of the Office of National Education Council in Thailand.

David S. Cunningham III '80 was appointed to the Los Angeles Superior Court by Governor Arnold Schwarzenegger in April.

Patrick Ende '82 has been named chief counsel to Maine Governor John Baldacci.

Felicia Marcus '83 has filled the newly created position of western director with the Natural Resources Defense Council.

Eric Doppstadt '84 was appointed vice president and chief investment officer of the Ford Foundation.

Loretha Jones '84 is the new president of programming, responsible for original programming, news, development, planning, and acquisitions at BET Networks.

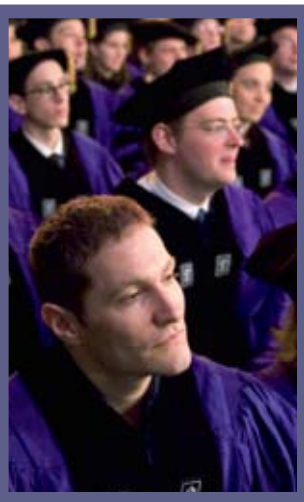
Ann Lininger '95 has been selected to serve a four-year term on the Clackamas County Board of Commissioners in Oregon.

Sean Burton '97 has been appointed to the Los Angeles Planning Commission by L.A. Mayor Antonio Villaraigosa.

Frank J. Macchiarola '02 has been named the Republican staff director of the Senate Committee on Health, Education, Labor and Pensions.

Making the Grade

Dr. Shila Sarker beams at her son, Paul, at the entrance to the WaMu Theater at Madison Square Garden. Paul Sarker is a media and licensing associate in the office of in-house counsel at Marvel Entertainment in New York City .



"Now we're looking out into the world and we can plot the direction and we can choose the way we want to walk."

J.D. class speaker
Ian Marcus Amelkin, the first person in his family to earn a professional degree

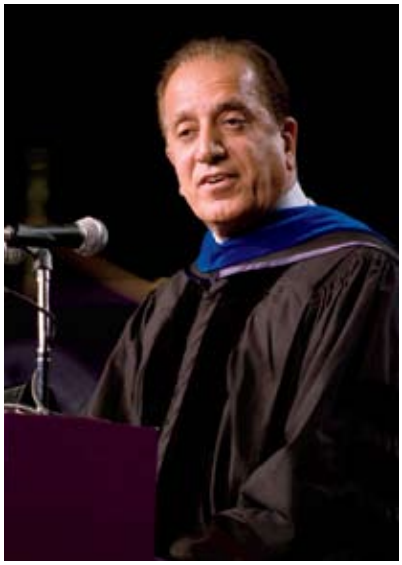
"NYU has truly been the greatest adventure of my life so far. Its brilliant academic environment, driven by the emphasis on innovation, has pushed us hard to ask the right questions more than to give the right answers."

Graduate studies class speaker
Matthildi Chatzipanagiotou

Convocation 2009

"The World's Most Powerful Political Idea"

Former U.S. envoy to Afghanistan, Iraq, and the United Nations lauds the rule of law.



The more than 1,000 members of the Class of 2009, who had already journeyed long and far in pursuit of their law degrees, traveled another 6,000 miles and back again when Zalmay Khalilzad, former U.S. ambassador to Afghanistan, Iraq, and the United Nations, invoked his own experiences in the Middle East to remind the students of their privilege and new responsibility.

"You are now custodians of the rule of law," Khalilzad said in his May 15 convocation address at Madison Square Garden's WaMu Theater. "Living in a modern Western democracy, it can be easy to forget just what this means, and more importantly, what its absence means.... I have come to believe that the rule of law, which in its contemporary form is closely associated with the United States of America, is the world's most powerful political idea."

The speech was subdued, yet powerful and even, at times, stirring. Khalilzad, now a counselor at the Center for Strategic and International Studies, helped create new constitutions in both Afghanistan and Iraq, where the United States is still struggling to maintain order. "All sides learned that one can do battle over important issues on the level of ideas and maneuvering through argument, lobbying, bargaining, and other such means, as an alternative to violence," he said. "In both cases the legal process, the negotiations, encouraged the start of a political reconciliation."

According to reports a few days later in the *New York Times*, Khalilzad could assume a powerful, unelected government

Brandon LeBlanc, above left, being hooded; Sumiti Yadava, above right, and LeBlanc were asked to say a few words on behalf of the Class of 2009.

Lauren Burke '09, chair of the Class of 2009 Graduation Gift Committee, and committee member Iván Chanis Barahona (LL.M. '09) presented the class's $62,700 gift to Law School Board of Trustees Chair Anthony Welters '77 and Lester Pollack '57, chair emeritus.

"Your NYU Law education has shown you—through your work with faculty, the clinics, and centers, and your exposure to alumni who are teachers, practitioners, judges, and policymakers—that there is more than one way to have an impact on law, on policy, on business, on communities, and on the lives of individual clients."

Dean Richard Revesz

position that he and Afghan President Hamid Karzai have described as chief executive officer of the country. This would represent an enormous trajectory for Khalilzad, who recalled in his speech being a teenage Afghani exchange student in a small California farming town, and feeling struck by its democratic spirit and American emphasis on fairness. A society that respected the rules was a revelation to him, he said, making life simpler in small but significant ways. In his native country he was used to the idea of buying a ticket to a sporting event or concert with the possibility of being ejected from his seat in favor of a higher-ranking individual.

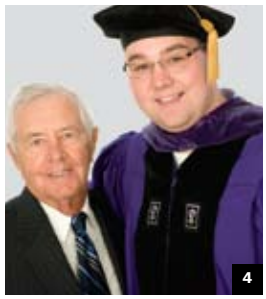
Building the rule of law is a slow process, Khalilzad admitted, pointing out that it has taken centuries in the West. "Solutions in other countries cannot just replicate those that have worked here, and instead must be tailored to their own political circumstances, traditions, and cultures. However, I firmly believe that the aspiration for the rule of law, the desire for justice, accountability, and due process, is universal." In places where women and minorities are denied equality and young people lack chances for merit-based advancement, Khalilzad said, lawyers can offer recourse. He stayed on this idealistic plane by offering some parting career advice: "If you take part in such efforts, it will be fulfilling for you personally, and it will have a great meaning for those you help in countries seeking the blessing of a system based on the recognition of human dignity and founded on the rule of law." □

Singapore Joint-Degree Program Graduates 55

THIS YEAR'S GRADUATES FROM THE NYU@NUS program celebrated the 2009 convocation on March 2 at the Asian Civilisations Museum in Singapore. Among the invited guests were family, friends, and faculty from both universities and then-Deputy Prime Minister of Singapore S. Jayakumar, who would soon be appointed senior minister and coordinating minister for national security.

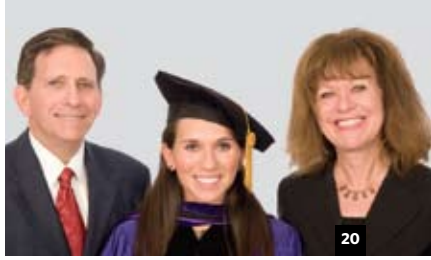
This is only the second class to graduate from the joint venture between the New York University School of Law and the National University of Singapore that NUS President Tan Chorh Chuan, speaking at the ceremony, said "exemplifies how two top universities with a global vision have combined their strengths and exploited complementarities to create a program that is unique in content and international in composition."

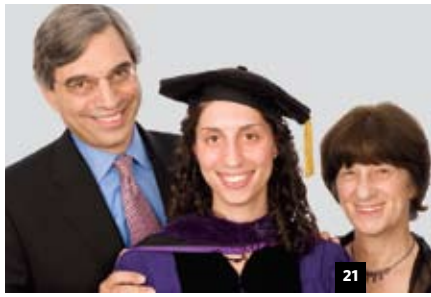
A recurring theme at the ceremony was the ability of the 55 graduates who hailed from 25 countries to better face the worrisome global economy armed with their dual degrees. Sumiti Yadava (LL.M. '09) said it most artfully: "Within the crisis lies an opportunity to test our strength, to show what winners are made out of, and to prove that NYU's motto, which calls upon us 'to persevere and to excel,' is not just words, but a way of life." □

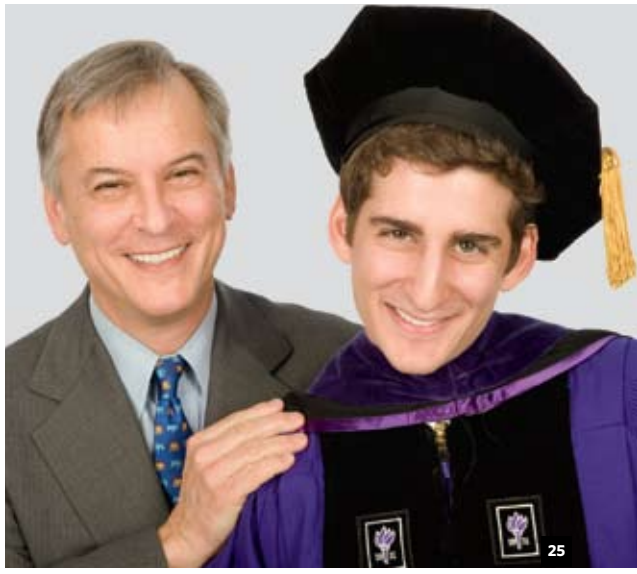


Pride and Joy

Beaming relatives and scholarship donors hood members of the Class of 2009 and celebrate the achievement of attaining a degree from the NYU School of Law.







Who's Who

1. Emilie Adams with her father, David Adams '77, and mother, Mindy Farber '77
2. Rebecca Anikstein with her mother, Karen Levy '77
3. Thomas John Attanasio with his father, John Attanasio '79
4. Andrew Baker with his grandfather, Charles Sakany '56
5. Omomichi Bujo with his wife, Natsuko Bujo (LL.M. '08)
6. Akash Desai with his brother, Atur Desai '06
7. Jason Falk with his father, Edward Falk (LL.M. '83)
8. Maurice Gindi with his cousin, Jacob Sasson '06
9. David Goldstein with his father, Seth Goldstein '76
10. James Hallock with his mother, Maryanne Honan '79, and father, Kurt Hallock '80
11. Brian Horan with his brother, Paul Horan '00
12. Jeremy Kimball with his father, Dudley Kimball '74 (LL.M. '78)
13. Emily Kindler with her father, Law School Trustee Robert Kindler '80
14. David Lawrence '09 with his brother, Matthew Lawrence '09
15. Yulia Makhotina with her husband, Mikhail Makhotin (LL.M. '07)
16. Katherine Mastman '09 with her brother, Michael Mastman '09
17. Ravi Mehta with his cousin, Mehri Shadman '06
18. Andrew Ross Meyerson with his mother, Roberta Meyerson (LL.M. '78)
19. Ann-Elizabeth Ostrager with her father, Barry Ostrager '72
20. Danielle Polebaum with her father, Elliot Polebaum '77, and her mother, Gilda Brancato '77
21. Rebecca Press with her father, Aric Press '74, and mother, Jean Berman '77
22. Matthew Benjamin Rogers with his father, Laurence Rogers '75
23. Sarah Samuels with her father, John Samuels (LL.M. '75)
24. Zachary Segal with his brothers Justin Segal '96 and Law School Trustee Andrew Segal '92
25. David Alfasi Siffert with his father, NYU School of Law Adjunct Professor John Siffert

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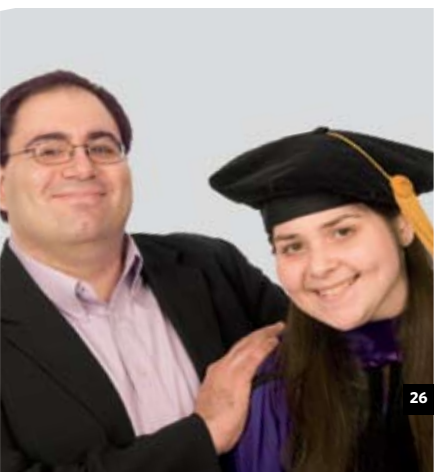
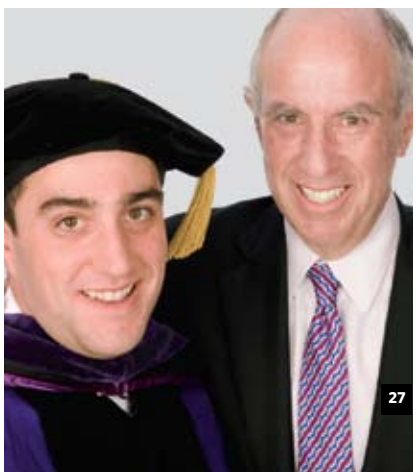
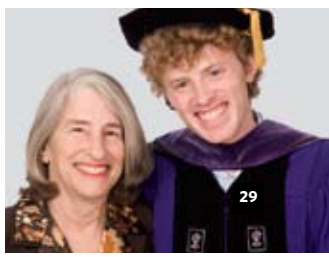
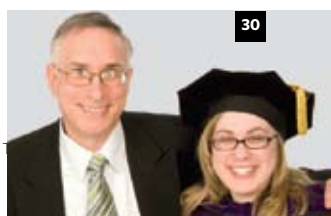
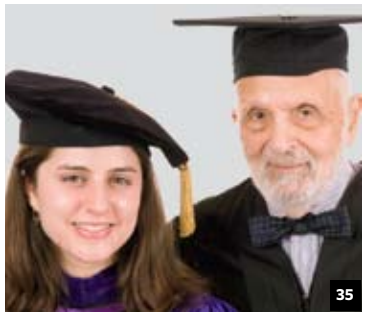










26. Cheryl Ann Testa with her fiancé, Michael Espinoza '06
27. Michael Tisch with his father, University Trustee Daniel Tisch
28. Jaime Vasquez with his brother, Juan Vasquez Jr. (LL.M. '02), and father, Judge Juan Vasquez (LL.M. '78)
29. Tim Henry Warden-Hertz with his grandmother, Natalie Hertz '76
30. Lindsey Weinstock with her father, Jeffrey Weinstock '73

Scholars and Donors

31. AnBryce Scholars (from back): Krenice Roseman, Joe Hurtado, Toby Lewis, Christopher Filburn, Jason Banks, Kristina Alexander, Jennifer Swayne, Hyun Kim, and Lerin Kol were hooded by Anthony Welters '77, chairman of the Law School's Board of Trustees, and Beatrice Welters
32. M. Carr Ferguson Fellow David Warner was hooded by Law School Trustee M. Carr Ferguson (LL.M. '60)
33. Furman Academic Fellows (from back): Matthew Lawrence, Brian Burgess, Patrick Garlinger, Rebecca Stone and Joshua Libling were hooded by Law School Trustee Jay Furman '71
34. Hauser Global Law School Starr Scholars Na Yang, Davidson Mwaisaka, and Alamo Laiman were hooded by Starr Foundation President and Law School Trustee Florence Davis '79
35. Deborah Rachel Linfield Fellow Elizabeth Seidlin-Bernstein was hooded by Jordan Linfield
36. KPMG Graduate Tax Scholars Gunther Wagner and Matthew Reiber were hooded by Lawrence Allen Pollack (LL.M. '88) (not photographed: Ajay Gupta)
37. Norma Z. Paige Scholar Eleanor Tai was hooded by Law School Trustee Norma Paige '46
38. Sinsheimer Public Service Scholar Russell Curtiss Crane was hooded by Law School Trustee Warren Sinsheimer (LL.M. '57)
39. C.V. Starr Scholars Jeffrey Goetz and Jonathan Horne were hooded by Law School Trustee Florence Davis '79
40. The Sullivan & Cromwell Public Interest Scholar Anna Purinton was hooded by Law School Trustee Kenneth Raisler '76

Making the Grade photographs by Leo Sorel

"Be Citizen Ambassadors"

Secretary of State Clinton receives an honorary doctorate of laws and delivers a commencement address.

With Washington Square Park still undergoing renovation, a brand-new Yankee Stadium pinch-hit as the site for New York University's 177th Commencement Exercises. An estimated 20,000 guests donned NYU Commencement baseball caps, transforming the first and second decks from their usual navy-and-white pinstripes to violet.

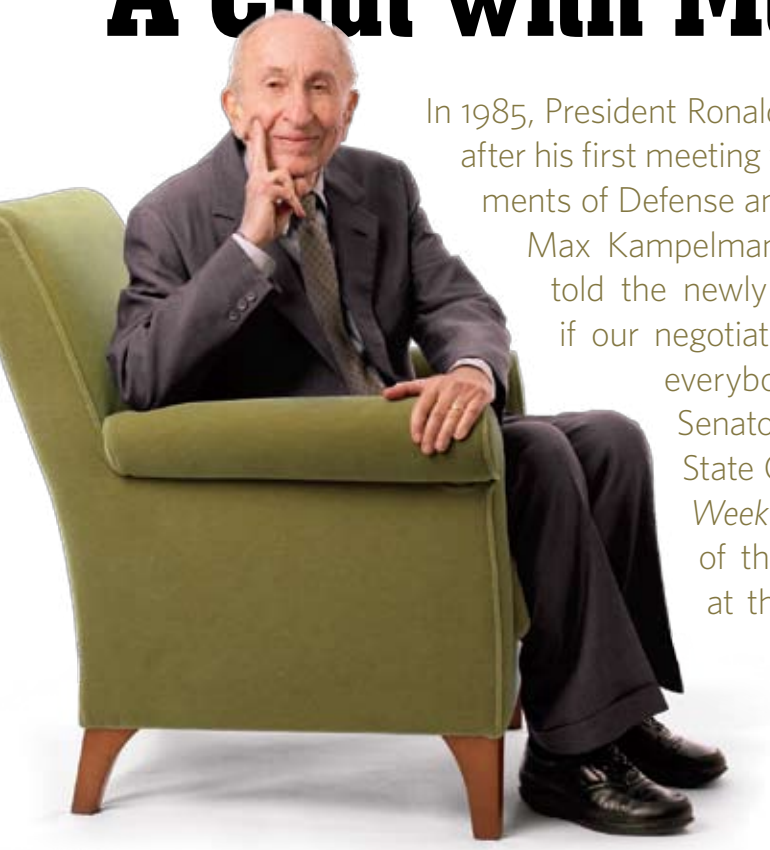
The smell of fresh paint and new plastic intermingled with amplified speeches that were somber and hopeful, referencing the serious, even perilous, issues currently at play while also acknowledging our human progress. "We live in an era when the great world has grown small," said President John Sexton. "What happens in distant places is experienced almost everywhere, by almost everybody, immediately and unavoidably."

The university bestowed five honorary degrees on such notables as physicist Albert Fert, healthcare advocate Jessie Christine Gruman, former White House journalist Helen Thomas, and playwright, director, and NYU alumnus John Patrick Shanley. Introduced by President Sexton as a "deeply loyal and cherished friend of NYU," Secretary of State Hillary Clinton, who received an honorary doctorate of laws, spoke on behalf of all the honorary degree recipients. While describing the rough road ahead, Clinton recognized the potential of the new administration and the new graduates. "I am well aware of the challenges that we face," said Clinton. "You, as new graduates, and your generation will be up against those challenges: climate change and hunger, extreme poverty and extreme ideologies, new diseases and nuclear proliferation." She noted that the young inevitably must step up to the plate: "The biggest challenges we face today will be solved by the 60 percent of the world's population under the age of 30."

Clinton expressed confidence that before her sat a "future generation of diplomats." The use of new media and social networking Web sites—the same ones that helped Barack Obama become the 44th president of the United States—can be the seed of change. Clinton told the story of anti-terrorism protests in Colombia, fueled by the support of over 250,000 Facebook users. Diplomacy, as Clinton pointed out, is no longer "the domain of privileged men working behind closed doors."

As the purple-and-black-robed graduates left Yankee Stadium, now armed with NYU degrees, the words of Clinton, former first lady and once and perhaps future presidential candidate, lingered on, urging them to swing for the bleachers: "Be the special envoys of your ideals; use the communication tools at your disposal to advance the interests of our nation and humanity everywhere; be citizen ambassadors, using your personal and professional lives to forge global partnerships, build on a common commitment to solving our planet's common problems." □

A Chat with Max Kampelman



In 1985, President Ronald Reagan reported back to his principal advisers after his first meeting with Mikhail Gorbachev. Members of the departments of Defense and State were there, and so was arms negotiator Max Kampelman '45, who remembers Reagan saying that he told the newly installed Soviet leader: "Wouldn't it be great if our negotiations ended up with zero nuclear weapons for everybody?" Kampelman, who was also a top aide to Senator Hubert Humphrey, counselor to Secretary of State George Shultz, and founding host of *Washington Week in Review*, talked this spring with Daniel Benjamin of the Brookings Institution about what drives him, at the age of 88, to work for nuclear disarmament.

So in 1985 how did all of Reagan's advisers react to the "zero" comment? There was consternation. His staff and cabinet people very politely tried to point out that it was not in our interest to go to zero. He listened attentively—didn't argue, didn't respond. But a year later in Reykjavík he repeated zero to Gorbachev.

Why are you pushing the "zero option" now? I read in the press after 9/11 that if those airplanes had carried nuclear weapons, New York and Washington would have been destroyed. It scared the living daylights out of me. So I called some of my old staff and asked them, "Were you right or was Reagan right?"

That's how you became the catalyst behind the "Gang of Four"—former Secretaries of State George Shultz and Henry Kissinger, former Secretary of Defense William Perry and former Senator Sam Nunn—who are advocating eliminating nuclear arms. But with the North Koreans testing their nuclear device and the Iranians enriching uranium, this doesn't seem the time to go to zero. All of this makes it essential to go to zero. It's got to be done universally. It also cannot realistically materialize unless we develop a method of preventing cheating.

We must first establish a recognition about the international desirability and necessity of zero, and build on that. It depends on our leadership or the leadership of other countries—and, in my opinion, the declaration of the "ought" by the General Assembly of the United Nations. There is no other vehicle in the world which can establish the "ought." Now, it is much too weak and unable to bring about the "is," but it can establish the "ought."

Would you support the use of force against Iran if it doesn't stop the development of nuclear weapons? Yes. If they got it, and the Pakistani scientist admits he sold the goddam thing, I would.

You have always described yourself as a liberal Democrat. How did you become Ronald Reagan's arms negotiator? When Reagan was elected, I was in Madrid as President Carter's negotiator for the Conference on Security and Cooperation in Europe, the continuation of the 1975 Helsinki Conference. I got a call from Al Haig, who was going to be the secretary of state. "The president wants to reappoint you." I knew Haig quite well and said, "Al, I'm a Democrat." He says, "He knows you're a Democrat and he's reappointing two Democrats: you and Ambassador Mike Mansfield in Japan."

Madrid lasted till 1983, then I was back in private life. President Reagan, out of the blue, calls me up and says, "Max, we're gonna restart our negotiations on arms." I knew he had just seen Gorbachev in Geneva. "And I want you to head up the American delegation." I said, "I'm not equipped—I don't know the first thing about the nuclear arms issue." He said, "I know, but you and I worked very closely in Madrid." And he then said with a laugh, "Actually you're the only fellow Shultz and [Caspar] Weinberger could agree on."

As an aide to Humphrey, you worked for the passage of key civil rights legislation. How did you feel seeing an African American sworn in as president? Really, my chest bursts with satisfaction. My concern is that he is inadequately prepared. But he can learn.

You had been a pacifist during World War II—a pretty unusual thing for a Jewish kid from the Bronx. And as a conscientious objector, you were involved in a range of government-approved activities. I was an only child; I went to a Jewish school. But the exposure to the world was not there. During the war, I worked as a hospital nurse for mentally handicapped children in Maine, and was involved in soil conservation work and the University of Minnesota's Starvation Experiment, which was supposed to help the authorities learn what challenges they would face with POWs and concentration camp survivors. We had a 1,500 calorie-a-day diet and 3,000 calorie-a-day work regimen. I went from 161 pounds to under 120.

Looking back on your life, what are you proudest of? The Starvation project. Everything else took time, a little energy—but the thing that hurt and I paid a price for was the Starvation Experiment. □

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