

# The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW | 2010

## THE NEW NEW DEAL

Faculty and students engage in ideas for making better and more effective government.

## MEDIATOR IN CHIEF

Ken Feinberg '70 signs on for the impossible—again.

## WHERE THERE'S A WILF

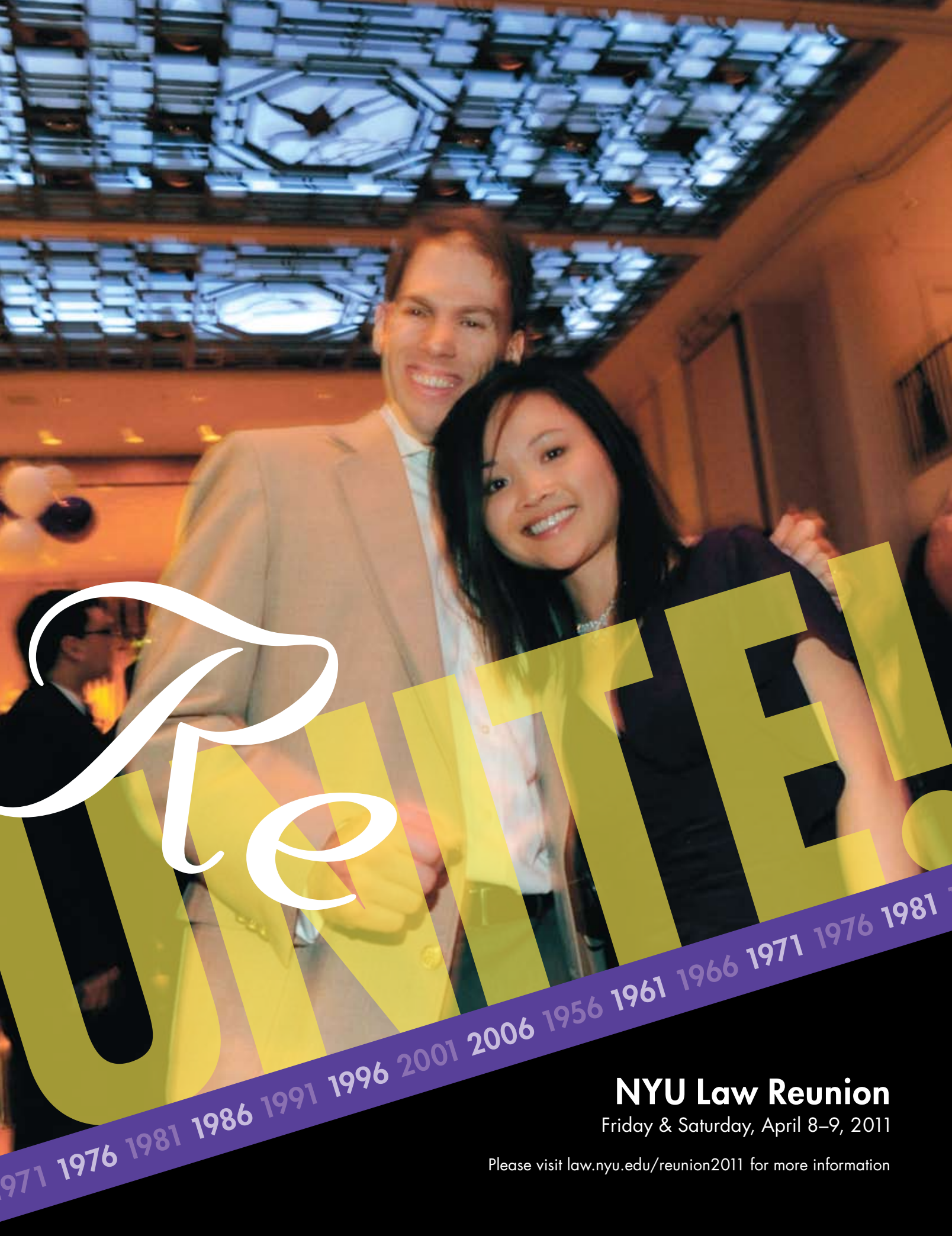
A new academic hall debuts on MacDougal Street.

A man in a dark suit and green tie is leaning against a concrete wall with a metal railing. He is looking directly at the camera. In the background, a city street with buildings and a car is visible.

# THE GUARDIAN

He has stared down drug kingpins, Wall Street CEOs, and even the Treasury secretary. How Special Inspector General Neil Barofsky '95 is protecting the taxpayers' \$700 billion bailout fund.





# ReUNITE!

1971 1976 1981 1986 1991 1996 2001 2006 1956 1961 1966 1971 1976 1981

**NYU Law Reunion**

Friday & Saturday, April 8–9, 2011

Please visit [law.nyu.edu/reunion2011](http://law.nyu.edu/reunion2011) for more information

# A Note from the Dean

As many readers know, in each year's magazine since I became dean in 2002, we have featured an area of law in which I am confident a peer review would say we take the lead among top law schools. Past issues have highlighted our programs in international, environmental, criminal, and clinical law; legal philosophy; civil procedure; and the relatively new fields of law and democracy and law and security. This year, we feature a subject very close to my heart, administrative law and policy.

"Building Good Government," by Larry Reibstein, traces how NYU School of Law became the first leading law school to successfully require a 1L course that analyzes statutes and their implementation by administrative agencies. That our course has thrived for



the last seven years, while it has flourished elsewhere, is a testament to my outstanding colleagues, who engage with policies and politics in their own practice and scholarship, and use those experiences to bring the subject to life in the classroom. The conversation extends beyond the classroom, too, as this year the Law School welcomed key regulatory thinkers from the Clinton and first Bush administrations, and held several spirited debates about financial, healthcare, and auto-industry reform.

Just as the administration of U.S. affairs has become more

complicated, governance in the world has taken on a whole new dimension. Last year the Law School was honored to host some of the world's leading scholars of global governance for year-long fellowships at the new Straus Institute for the Advanced Study of Law & Justice, directed by University Professor Joseph Weiler. For our roundtable discussion "The Shape of Global Governance," the magazine invited the Straus fellows to join Joseph and other key faculty members for a thoughtful conversation about how to structure behavior among nations in the 21st century.

Democratic government, of course, is ultimately by and for the people. I am impressed by our alumni, some of whom have accepted leadership posts in which they must make difficult, often unpopular decisions while our nation grapples with the fallout from the global financial crisis. Don't miss our cover story, "The Man Following the Money," in which Duff McDonald profiles Neil Barofsky '95, special inspector general for the Troubled Asset Relief Program. Neil's track record prosecuting international drug smugglers and fraudulent mortgage brokers as a U.S. assistant district attorney for the Southern District of New York now looks like a blueprint for excelling in his unprecedented role of investigating and auditing the \$700 billion bank bailout. With his forthrightness, he reminds me of another alumnus who has taken a series of challenging jobs. In "A Chat with Kenneth Feinberg '70," the then-special

master for TARP executive compensation reveals how he manages unique assignments compensating victims of 9/11, Agent Orange, and other disasters. Not three months after our interview, Ken became President Obama's choice to oversee the BP victims' fund.

Even in the midst of the financial downturn, here at NYU Law we are still investing prudently but optimistically in the future. In October we will officially open Wilf Hall, a state-of-the-art new academic building on MacDougal Street named after the family of our trustee donors, cousins Leonard Wilf (LL.M. '77) and Mark Wilf '87. And this fall we welcome six fantastic new professors. They join a stellar group of full-time faculty recruited during my deanship who are whimsically depicted on page 48.

The news and ideas that fill every page of this magazine are a credit to you, our alumni, who have supported our institution as it has transformed itself into a world-class law school. I was thrilled at the March Weinfeld Gala to announce the final tally for our seven-and-a-half year capital campaign. We raised a total of \$415,064,515. The annual average raised during our campaign was more than that of any other law school campaign. What a wonderful way to celebrate our 175th anniversary. Here's to another 175 great years!

RICHARD REVESZ



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# The Law School

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## 4 Notes & Renderings



Lily Batchelder joins the Senate Finance Committee's tax team; New York State honors the Offender Reentry Clinic; will Mohamed ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04) become Egypt's next president?; and more.

## 39 Faculty Focus



The stars come out as the *Annual Survey* is dedicated to Arthur Miller; in an upcoming book, David Garland notes a sociological tie between the U.S. death penalty and lynching; Philip Alston wraps up six successful, principled years as a U.N. special rapporteur; and more.



## 50 ADDITIONS TO THE ROSTER

The Law School welcomes six new faculty members, including Daryl Levinson, and 60 visiting faculty and fellows.



## 63 FACULTY SCHOLARSHIP

Ryan Goodman, left, Amy Adler, and Samuel Rascoff share excerpts from their recent journal articles. Plus, a list of 2009-10 publications by the full-time faculty on page 74.

## 81 Student Spotlight



White House Adviser Valerie Jarrett (pictured with J.D. speaker Helam Gebremariam) gives an inspiring convocation speech; a new star-studded weekly panel discussion galvanizes the student body; the pros seek Jeremy Babener '10 for his expertise in tax and tort law; Camilo Romero '12 finds his passionate activism rewarded; and more.

## 95 STUDENT SCHOLARSHIP



Allison Westfahl Kong '10 exposes serious weaknesses of endangered species policies, and Matthew Shahabian '11 argues for procedural protection in the United States government's bank and automaker bailouts.

## 99 Around the Law School



Andrew Cuomo declares his love for public service; experts voice their opinions on the financial crisis; Amartya Sen helps kick off the Straus Institute; and more.

## 109 Alumni Almanac



Anthony Foxx '96 makes a mark as the new mayor of Charlotte, North Carolina; Labor Department Solicitor M. Patricia Smith '77 is the alumna of the year; Weinfeld Gala celebrates a blockbuster capital campaign; and more.

## 120 A Chat with...



Kenneth Feinberg '70, administrator of the BP fund, reveals why he keeps agreeing to do the impossible—and how he succeeds.





10

Trustees Leonard Wilf (LL.M. '77) and Mark Wilf '87



30

## 10 Opening Soon: Wilf Hall

The NYU School of Law's newest building is designed to meet the highest energy and environmental standards in the United States. Take a sneak peak at the green roof and terraces; meet the benefactors and crew; and get the backstory on our center for centers, programs and institutes.

## 12 Solving the Policy Puzzle

Our faculty made a prescient decision 10 years ago to require the Administrative and Regulatory State as a first-year course. This successful initiative is just one way our students and faculty engage in ideas about our government as it is redefined by healthcare, financial, and other policy reforms.



12

## 22 Who Rules the World?

Twelve leading international legal scholars, political scientists, and philosophers—all NYU Law faculty or visiting fellows—convene for a thoughtful discussion of how to define global governance, how rule of law factors in, and how to measure success. The elephant in the room: What should we call this?



22

## 30 The 700 Billion Dollar Man

As special inspector general for the Troubled Asset Relief Program, Neil Barofsky '95 shoulders the unprecedented burden of accounting for our bailout tax dollars. Luckily, as a former prosecutor who has eluded assassination attempts by murderous drug cartels, he's not intimidated by this assignment.

# Notes & Renderings

## Counsel on Tax Dollars and Sense

**L**ILY BATCHELDER, PROFESSOR OF LAW AND PUBLIC Policy, has taken a leave of absence to become chief tax counsel for the U.S. Senate Committee on Finance, where she served as a law clerk in 2001. "I'm glad to welcome Lily back to the Senate Finance Committee's tax team," said Committee Chairman Max Baucus in a May statement. "Lily's wide range of experience and expert knowledge of tax and public policy make her an invaluable adviser to the Finance Committee as we continue our efforts to create jobs, help small businesses grow, close the tax gap, and explore tax reform."

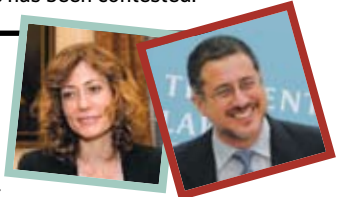
Batchelder has been an adviser to policymakers, public agencies, and nonprofits particularly on matters at the intersection of tax and social policy. Her recent scholarship has focused on efficiency in the design of tax incentives—she has a forthcoming book, *\$750 Billion Misspent? Getting More from Tax Incentives*, co-authored with Austin Nichols and Eric Toder—and estate tax reform, on which she testified before the Senate Finance Committee in 2008. Batchelder is also an affiliated professor at NYU's Wagner School of Public Service and an affiliated scholar at the Urban-Brookings Tax Policy Center. She was a tax associate at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C., and New York before joining NYU Law's faculty in 2005, where she was a co-director of the Furman Academic Scholars Program.

Batchelder's colleagues applaud the appointment. "She's good at understanding theory; she has empirical skills; and a primary interest in her work is real-world ideas," says Daniel Shaviro, Wayne Perry Professor of Taxation. "She's interested in figuring out feasible policies that could actually be enacted and affect the political process."



## ElBaradei for President?

**SINCE RETURNING** to his homeland in 2009 after a 30-year absence, Nobel Peace Prize winner Mohamed ElBaradei has attracted crowds of admirers urging him to run for office. ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04), who as director general of the International Atomic Energy Agency challenged the United States' claim that Iraq had an active nuclear weapons program in 2003, has begun a campaign for political change in Egypt but has not declared candidacy for 2011. In April he told CNN, "My primary goal is to see my country, Egypt, where I grew up, making a genuine shift toward democracy." Hosni Mubarak, president for 29 years, won reelection amid charges of fraud in 2005, the only time he has been contested.



## Center Stars

Former Attorney General of New Jersey Anne Milgram '96 and Pulitzer Prize-winning former *Washington Post* reporter Barton Gellman became fellows at the Law School this spring. Milgram joined the Center on the Administration of Criminal Law as a senior fellow and will work on projects aimed at promoting good government and prosecution practices in the criminal justice system; she will also teach a seminar. Gellman joined the Center on Law and Security as a senior research fellow and will develop a new program on investigative strategies for journalists and researchers studying defense, intelligence, and foreign policy.

**"What we have seen is a constant movement of case disposition earlier and earlier and earlier in the life of the case, further and further away from trial, denying the jury trial right. Now we are at Genesis. The motion to dismiss is at the courthouse door. The only thing left...is shoot plaintiffs before they come into the courthouse."**

University Professor **ARTHUR MILLER** testified before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 27. The issue? An examination of *Ashcroft v. Iqbal*, the Supreme Court ruling asserting that courts assess a claim's plausibility prior to discovery.

**COURT CASE CLOSED**





## A Challenge to Peremptories

An Equal Justice Initiative report, "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," sparked debate in June about the use of peremptory strikes to remove jurors because of their race, a practice that was outlawed in 1986 by the Supreme Court in *Batson v. Kentucky*.

An EJI team including a dozen NYU School of Law alumni reviewed hundreds of court documents and interviewed more than 100 African Americans who had been excluded from juries in eight Southern states. They found that prosecutors have used their peremptory strikes to exclude jurors for "low intelligence," seeming "arrogant," and walking a certain way. "The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility

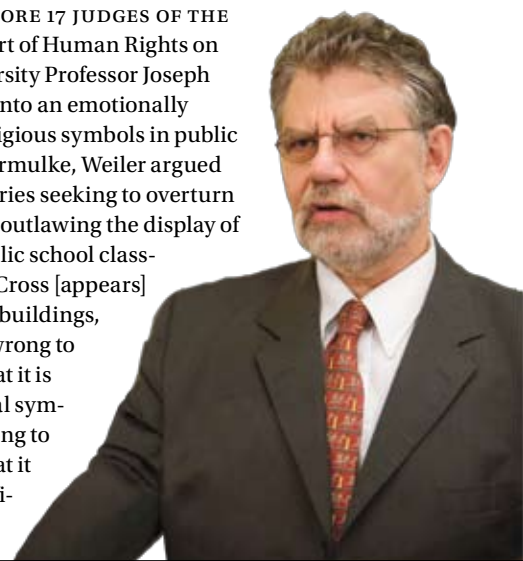
and reliability of the criminal justice system, and there is an urgent need to end this practice," said EJI Executive Director and NYU Professor of Clinical Law Bryan Stevenson in the report's summary.

A June 4 *New York Times* editorial said the EJI report illuminated "the grim truth" of a prediction Justice Thurgood Marshall made in *Batson* that prosecutors would simply invent race neutral reasons to comply with the law. CNN, NPR, and the *American Prospect* also covered the EJI study.

Stevenson saw his views on another issue prevail in May when the Supreme Court prohibited sentences of life without parole for juveniles in non-homicide cases. The decision in *Graham v. Florida* also resolved the companion case, *Sullivan v. Florida*, which Stevenson argued.

## Defending the Cross

**A**PPEARING BEFORE 17 JUDGES OF THE European Court of Human Rights on June 30, University Professor Joseph Weiler waded into an emotionally charged debate over religious symbols in public buildings. Wearing a yarmulke, Weiler argued on behalf of eight countries seeking to overturn a lower chamber ruling outlawing the display of crucifixes in Italian public school classrooms. "In Europe, the Cross [appears] on endless flags, crests, buildings, etc.," Weiler said. "It is wrong to argue, as some have, that it is only or merely a national symbol. But it is equally wrong to argue, as some have, that it has only religious significance. It is both."



## Aces on International Affairs

Ryan Goodman (top), Anne and Joel Ehrenkranz Professor of Law, and José Alvarez (bottom), Herbert and Rose Rubin Professor of International Law, have joined the U.S. Department of State Advisory Committee on International Law to advise Secretary of State Hillary Clinton and her legal adviser, Harold Koh. This spring, Alvarez was also appointed special adviser on international law to Luis Moreno-Ocampo, prosecutor of the international

Criminal Court (ICC). Alvarez will offer his expertise on public international law questions, such as those involving the relationship between the U.N. Security Council and the ICC. "I am thrilled and honored to work with the prosecutor, especially on the cutting-edge issues that this relatively new court is raising," Alvarez says. "I know many NYU Law students will be eager to assist me and the prosecutor in this effort."



## Advocating for Chinese Dissidents—and a Dad

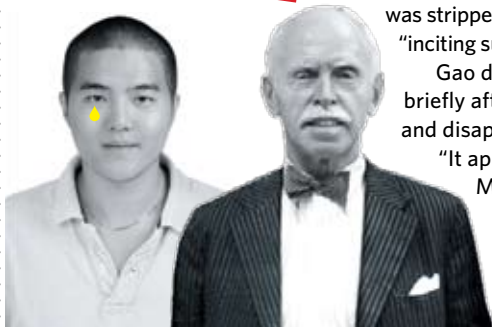
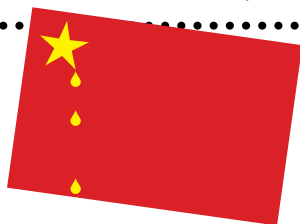
**DURING THE LAST YEAR**, Professor of Law Jerome Cohen has kept up pressure on China, writing many op-eds about Gao Zhisheng, a leading human rights lawyer known as the "conscience of China" who was stripped of his law license and convicted of "inciting subversion of state power" in 2006.

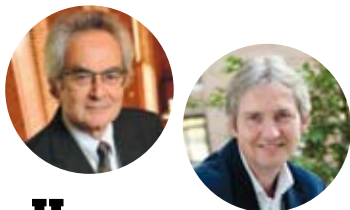
Gao disappeared in 2009, reappeared briefly after protests from rights groups, and disappeared again in April 2010.

"It appears that the government fears Mr. Gao, even under house arrest, more than it fears the international community's condemnation of his renewed 'disappearance,'" wrote Cohen and Beth Schwanke,

legislative counsel for Freedom Now, in the *Wall Street Journal* in May.

For Times Wang '11, one of Cohen's students, the situation is personal. His father, Wang Bingzhang, has been a political prisoner since 2003. On the eve of Barack Obama's first visit to China, in November 2009, the younger Wang wrote an op-ed in the *Washington Post*, urging U.S. action against China for human-rights abuses. Adding that his father was a nominee for the Nobel Prize that Obama had just been awarded, he wrote, "It is especially appropriate that Obama should confront human-rights issues on this trip; within Chinese prisons sit numerous Peace Prize nominees."





## Honorary Doctorates

Harvard University granted NYU University Professor Thomas Nagel an honorary doctorate of laws in May. Provost Steven Hyman called Nagel "one of the most influential philosophers of modern times."

Nagel (above left) also holds an honorary doctorate of letters from the University of Oxford and has received many prestigious honors for his work, including the Rolf Schock Prize in Logic and Philosophy, the \$885,000 Balzan Prize in Moral Philosophy, the \$1.5 million Mellon Foundation Distinguished Achievement Award, and a Guggenheim Fellowship. Last year Nagel's colleague Ronald Dworkin, Frank Henry Sommer Professor of Law, received an honorary doctorate of laws from Harvard.

David Garland (above right), Arthur T. Vanderbilt Professor of Law, accepted an honorary doctorate from the Free University of Brussels in December for his "achievements in the field of law, criminology, and sociology" and "scientific research on an interdisciplinary basis aimed at integrating the fields of criminology, law, sociology, and philosophy."

## PROCLAMATIONS of DEDICATION

Professor of Clinical Law Anthony Thompson had a big surprise in April for students in his Offender Reentry Clinic: citations from the New York State Department of State recognizing their efforts to fight discrimination against ex-offenders seeking licenses to be security

guards. "Tony Thompson and the class gave applicants access to legal services they wouldn't have had," said Joel Barkin, deputy secretary of state for public affairs. "These citations are recognizing how important the clinic has been."

Thompson, who won an NYU Distinguished Teaching Award this year, said this was the first time in his 14 years of teaching that a government entity recognized the work of its legal adversaries—his students. "This," he said, "is what happens when people litigate with passion."



## Two Best-of-2009 Scribes

Praising it as a "thoughtful and thorough examination of the moral quandaries inherent in the Israeli invasion in Gaza," *New York Times* columnist David Brooks named Gruss Professor of Law Moshe Halbertal's "The Goldstone Illusion" one of the best magazine pieces of 2009. The November 6, 2009, *New Republic* article analyzed Judge Richard Goldstone's "Report of the United Nations Fact Finding Mission on the Gaza Conflict."

*Slate* Senior Editor Dahlia Lithwick called Karen Greenberg's *The Least Worst Place*, about the creation of the Guantánamo Bay detention camp, "[T]he most important legal book I read this year.... Greenberg provides a taxonomy of what went wrong and shows us that it could all have come out very differently." Greenberg is executive director of the Law School's Center on Law and Security.



## An Enduring Claim

Last December, Supreme Court Justice John Paul Stevens cited a 2002 NYU Law student article in his dissent in *Johnson v. Bredesen*, an application for a stay of execution and petition for a writ of certiorari. At issue was whether spending nearly three decades on death row constitutes cruel and unusual punishment under the Eighth Amendment. Stevens, arguing it did, cited "Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim" from the *NYU Review of Law & Social Change*, in which Jeremy Root '02 provided statistical evidence of error rates in capital trials.

Now an associate at Stinson Morrison Hecker in Jefferson City, Missouri, Root continues to pursue pro bono the Eighth Amendment's application to lengthy delays that death-row inmates experience. "I still believe that the claim draws on a lot of values that are cherished in our constitutional system," Root says, "but so far, very few courts have been willing to grant relief on that basis."



**VOTERON**

**"Criminal disenfranchisement laws continue to have a lingering, often intended, racial effect today.... By providing a uniform national standard to restore voting rights to persons who have been released from prison and have rejoined their communities, the act will achieve widely supported democratic reform in practice, as well as theory, and will finally sever, once and for all, a disturbing link with our country's troubled racial history."**

**BURT NEUBORNE**, Inez Milholland Professor of Civil Liberties, testified before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on March 16. He spoke in support of the Democracy Restoration Act of 2009, which would restore voting rights in federal elections to almost four million disenfranchised ex-convicts with a felony in their past.



## Presidential Appointment

Barack Obama appointed NYU School of Law Trustee and alumna Rita E. Hauser to the President's Intelligence Advisory Board last December. Hauser had served on the nonpartisan board during George W. Bush's first term, when it was known as the President's Foreign Intelligence Advisory Board. Along with her husband, Gustave (LL.M. '57), Rita Hauser is a principal benefactor of the Law School's Hauser Global Law School Program. An international law expert, she is president of the Hauser Foundation, a private philanthropic organization promoting conflict resolution and democracy, and is also of counsel at Stroock & Stroock & Lavan, where she was a senior partner for more than 20 years. She has received both the Albert Gallatin Medal, NYU's highest public service honor, and the Arthur T. Vanderbilt Medal, NYU Law's highest distinction.



## Bittersweet Victory in 23-Year-Old Case

**R**ICHARD PILDES, SUDLER Family Professor of Constitutional Law, won the last round of a 23-year legal battle last December, when the U.S. Court of Appeals for the Seventh Circuit threw out a \$15 million IRS bill for back taxes, penalties, and interest to deceased Chicago tax attorney Burton Kanter, who had been charged, along with two others, with tax fraud. Pildes represented Kanter's family.

This was the final piece of a Supreme Court case Pildes won four years ago. In *Estate of Burton W. Kanter v. Commissioner of Internal Revenue*, Pildes argued that the reports of the U.S. Tax Court's hearing judges, or special trial judges, could not be kept secret, as had been done for 20 years.

In the aftermath of that decision, the special trial judge's report in the Kanter



fraud case was revealed to have concluded that there was insufficient evidence for the allegations against Kanter. Despite that finding, the Tax Court ultimately upheld the allegations, triggering the appeal. The Seventh Circuit opinion finally vindicates Kanter of the tax fraud charges against him, eight years after his death and nine years after Pildes became involved in the case. "The frustration," says Pildes, "is that it's taken this many years to get to the point where all three taxpayers were completely vindicated."

# 46 alumni

are clerking on the Federal Courts of Appeals in the 2010-11 term, which is a

# 64% increase

over the previous year. Alumni also represent

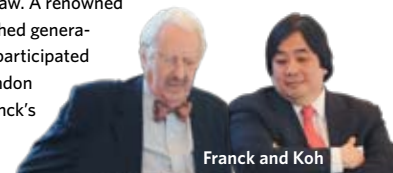
# 3 out of the 10 clerks

on the Delaware Court of Chancery, the nation's preeminent forum for resolving business disputes.



*"As legal adviser to the State Department, I realize that I and our country have not thanked Tom enough. In an academic world that is often cold, he was always warm. In a political world where cynicism reigns, he was always an idealist. In a human world that often disappoints, he never disappointed."*

—**HAROLD KOH**, Legal Adviser, U.S. Department of State, from the October 2009 memorial tribute to **THOMAS FRANCK**, Murry and Ida Becker Professor of Law Emeritus, at NYU School of Law. A renowned international scholar, Franck touched generations of scholars, many of whom participated in a May 2010 University of London symposium dedicated to Franck's life and work.



Franck and Koh

**"By holding—for the first time—that corporations have the same First Amendment rights to engage in political spending as people, the Supreme Court reordered the priorities in our democracy—placing special interest dollars at the center of our democracy, and displacing the voices of the voters."**



**MONICA YOUNG**, counsel in the Democracy Program of NYU Law's Brennan Center for Justice, testified in opposition to the Supreme Court's controversial opinion in *Citizens United v. Federal Election Commission* that struck down restrictions on corporate spending in elections. She appeared before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on February 3.



IN THE WINGS Shawn Clark '10, Sheel Bedi '10, Nicole Peles '10, Leigh Nathanson '10, Moses Sternstein '10, and Albert Levi '10. Inset: Pildes, left, and Clement.

## Clement Stands and Delivers

Although courtrooms have always been places of learning, the hallowed court chamber of the U.S. Supreme Court was literally transformed into a classroom when the students in the Fall 2009 Supreme Court Seminar attended oral arguments by one of their teachers, former U.S. Solicitor General Paul Clement, an adjunct professor at NYU School of Law.

Each week in the seminar, co-taught by Richard Pildes, students examined an appeal in that term's Supreme Court docket and watched attorneys litigating the actual cases participate in mock arguments. One of the cases was *Pottawattamie County v. McGhee*, in which Clement challenged absolute prosecutorial immunity for instances in which

prosecutors allegedly procure false testimony during a criminal investigation that is later introduced at trial. The case was settled before the Supreme Court made a decision.

Albert Levi '11 says that while the classroom exercises were highly instructive, seeing his professor argue *Pottawattamie* last November was the best possible lesson in how to navigate an oral argument. He recalls how Clement repeatedly sidestepped the question of where to draw the line between the investigative stage, during which Clement maintained that prosecutors should be held liable for fabricating evidence, and the prosecutorial stage, in which immunity would still hold. Clement held his answer until the end, for maximum impact. "There was a trap, he avoided it, then he managed to counterpunch at the end," Levi says. "That, to me, is the definition of great."

## Waldron and Hate Speech



University Professor Jeremy Waldron delivered the prestigious three-part Holmes Lectures at Harvard Law School last October. It was his 13th major address at a top university.

Taking as his theme "Dignity and Defamation: The Visibility of Hate," Waldron first examined hate-speech laws around the world and the meaning of group libel, then turned to the question of whether such laws contribute to a well-ordered society, and, finally, to the effects of speech restriction on other laws.

Previous Holmes lecturers include Waldron's NYU Law colleague Ronald Dworkin, H.L.A. Hart, William J. Brennan Jr., and Antonin Scalia.

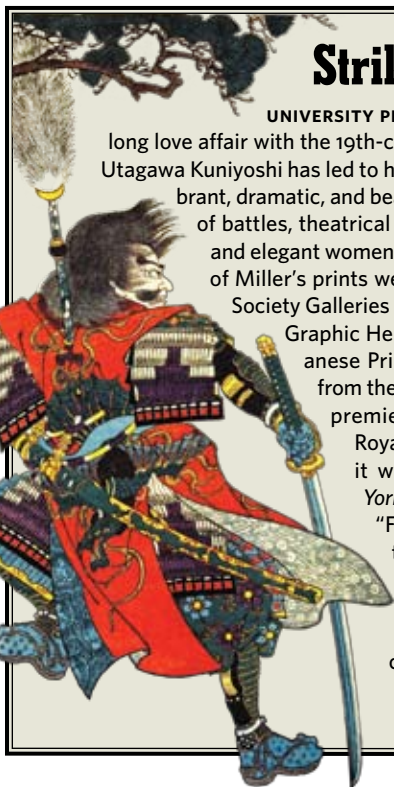
**"Because post-transaction marketers present themselves to consumers in an unexpected fashion at an unexpected juncture of the transaction, they violate the norms of online commerce and should be held to a higher standard of disclosure and transparency."**



Before the U.S. Senate Committee on Commerce, Science, and Transportation on November 17, Associate Professor of Law **FLORENCIA MAROTTA-WUGLER '01** spoke against the practice whereby online vendors instantaneously pass customer account information to a third party. As a result, many consumers have unwittingly purchased products such as discount subscription services.

## Striking Samurai

UNIVERSITY PROFESSOR ARTHUR MILLER'S long love affair with the 19th-century woodblock prints of Utagawa Kuniyoshi has led to his acquiring nearly 2,000 vibrant, dramatic, and beautifully colored depictions of battles, theatrical performances, landscapes, and elegant women. This spring, more than 130 of Miller's prints were on display at the Japan Society Galleries in New York City. The show, *Graphic Heroes, Magic Monsters: Japanese Prints by Utagawa Kuniyoshi* from the Arthur R. Miller Collection, premiered in 2009 at London's Royal Academy of Arts, where it was a smash hit. The *New York Times* reviewer concurred: "For sheer visual pleasure, this is an eminently gratifying show." In the catalog's foreword, Miller credits his NYU School of Law colleague Linda Silberman for introducing him to the art form 30 years ago.



## A Maven in Multiple Media

Having maintained a tax blog, *Start Making Sense*, since 2004, Daniel Shaviro, Wayne Perry Professor of Taxation, has gone multiplatform. This spring he self-published a legal thriller and had a featured role in a documentary.

Shaviro was interviewed along with Noam Chomsky, Steve Forbes, and Mike



Huckabee in *An Inconvenient Tax*, a full-length documentary that examines proposals to reform the nation's individual income-tax code. *Getting It* is Shaviro's novel about a young Washington lawyer gunning for partnership. Joseph Bankman of Stanford Law School described the book as "Evelyn Waugh meets John Grisham: Hilarious and gripping."





*"It is shocking how little liberty is valued in this system. Nobody stops to determine first whether somebody should be detained before locking them up and practically throwing away the key."*

—KELLI BARTON '10, JULIA DIETZ '10, and ALISA WELLEK '10, three students in Professor Nancy Morawetz's Immigrant Rights Clinic, speaking collectively about successfully releasing their client—a lawful permanent resident from Yemen—from six months of detention.

## A Civil Action: Ensuring Legal Representation for the Poor

Announcing his first major initiative since becoming chief judge of the State of New York, Jonathan Lippman '68 introduced a proposal in May to ensure that poor people in civil cases have access to lawyers. "I am not talking about a single initiative, pilot project, or temporary program," Lippman said at the time, "but what I believe must be a comprehensive, multifaceted, systemic approach to providing counsel to the indigent in civil cases."

To advance the proposal, Lippman created the Task Force to Expand Access to Civil Legal Services in New York and appointed Helaine

Barnett '64, former president of Legal Services Corporation, as chairwoman. The 28-person task force also includes Steven Banks '81 and Michael Rothen-

berg '91. Lippman attended the first of a series of hearings across the state, in Rochester in June, to assess the unmet needs. "For the poor, you can't tell me that adequate

civil legal help isn't every bit as important as their health care and their education," Lippman said at that hearing. "As lawyers, as judges... our constitutional mission is to provide equal justice under the law. If we're not going to do it, who is?"



FLOOD: REUTERS/MARK WILSON HEDGEHOG: AMERICAN IMAGES INC.

### CORPORATE MONITOR

**"The American public is deeply concerned about white collar and corporate crime.... To give the public confidence in white collar crime enforcement, it is critical that the government's white collar crime apparatus itself be free of corruption."**

**ANTHONY BARKOW**, executive director of the Center for the Administration of Criminal Law, testified before the House Subcommittee on Commercial and Administrative Law on November 19 in support of legislation that would limit former federal prosecutors from serving as or for corporate monitors in cases they investigated or prosecuted while in government service.

ILLUSTRATION: THE SPOT.COM/KEN ORVIDAS



## To Build without Risk

As the National Flood Insurance Program neared expiration for the third time, the Institute for Policy Integrity released a report detailing serious faults. In the April 2010 report "Flooding the Market: The Distributional Consequences of the NFIP," Economics Fellow J. Scott Holladay and Research Scholar Jason Schwartz '06 found that instead of protecting property owners in flood-prone areas such as the Gulf Coast, as it was intended to do, the NFIP uses federal dollars to subsidize the development of luxury homes in high-risk zones. "The policy redistributes wealth across income groups and state borders in ways that [policymakers] may not expect," the authors concluded. In June, the U.S. House of Representatives unanimously voted to extend the NFIP until October.

### Justice for Hedgehogs

## Patience, Pets

Although it is not scheduled to be published by Harvard University Press until January 2011, an eagerly anticipated book by Ronald Dworkin, Frank Henry Sommer Professor of Law, has already been the subject of a two-day conference at Boston University School of Law. The book, *Justice for Hedgehogs*, derives its title from a phrase by the ancient Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing." For Dworkin, the "big thing" is "the unity of value," he says, and he advocates the integration of ethics and morality, the latter rooted in self-affirmation rather than self-abnegation.







# BUILDING GOOD GOVERNMENT

## ONE LAW STUDENT AT A TIME

*Our nation runs, more and more, not on laws created in Congress and shaped in the courtroom, but on rules and regulations forged by those who hold unelected positions within government agencies, from the Administration for Children and Families to the Treasury Department. During the last 10 years, NYU Law has taken the lead in tailoring law school curricula to reflect this reality, with an engaged and dynamic faculty that both analyzes and participates in U.S. politics and policymaking.*

BY LARRY REIBSTEIN





## THE ELECTION OF BARACK OBAMA

reignited the debate about the role of government in regulating the lives of its citizens. The political left welcomed more oversight—and got it with sweeping healthcare reform and financial regulation; the right decried it. But the debate was really over a matter of degree. Starting with the New Deal, the regulatory state has grown into an elaborate system of administrative agencies interpreting and implementing laws passed by Congress. For lawyers, that growth has meant a huge shift in their practices and thinking—from a regime based on judge-made common law to one where government agencies created more and more of the law through regulations. “The modern regulatory state that grew up over the course of the 20th century has completely redefined the nature of law and legal practice,” says Michael Herz, a Benjamin N. Cardozo School of Law professor who is vice chair of the American Bar Association’s section on administrative law and regulatory practice. “Very few lawyers appear in court, but they do deal with agencies.”

Problem was, most law schools failed in their attempts to reflect this fundamental shift. But a decade ago, with the strong support of Professor Richard Revesz, the NYU School of Law put in motion an ambitious plan to prepare students for this new world—and to give them the underpinnings to help build a government that works better. Now the school’s dean, Revesz wanted to have the Law School play a pivotal role in generating fresh ideas in regulation—theoretical and practical—that would be advocated

to policymakers here and abroad. Today, after a series of initiatives, the school is considered a leading and innovative center for the teaching and study of administrative law and policy. Its faculty and former students are influential on important regulatory and administrative issues in Washington, from climate change to workplace safety to national security to financial regulation. “NYU has embraced administrative law more fundamentally than any place I know,” says Michael Levine, a distinguished research scholar and senior lecturer at NYU Law and a pioneer in airline deregulation.

Those initiatives have included: 1. In 2003 the school began requiring first-year students to take an administrative and regulatory law course—a closely watched and controversial decision that was soon followed by Harvard and Vanderbilt law schools, with a handful of others, including the University of Michigan and Georgetown, making it a first-year elective. 2. Two years ago, Revesz and one of his former students, Michael Livermore ’06, founded the Institute for Policy Integrity, which advocates before agencies, legislatures, and courts the idea of using cost-benefit analysis and economics to make better regulatory policy. 3. This fall upper-level students began working in a new policy clinic, co-taught by Livermore and Revesz, where they are participating in real regulatory proceedings before federal agencies. And, 4. To create an academic home where scholars and policymakers could wrap their heads around the vexing issue of how agencies, states, and regulators can coordinate across borders and between and among governments, Professors Richard Stewart and Benedict Kingsbury started the Global Administrative Law Project. Says Revesz: “We’re generating ideas, pushing them into the political process, pushing them before administrative agencies, and pushing them into the courts.”

Revesz has also wooed a number of prominent figures from both ends of the political spectrum who reflect a wide range of professional experience in administrative law and regulatory policy to teach at the Law School (see sidebar on page 16). From the bench come Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit and Senior Circuit Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit. From the executive branch come C. Boyden Gray and Sally Katzen, major regulatory thinkers for former Presidents George H.W. Bush and Bill Clinton, respectively. And from the private sector comes Levine, a former executive at Continental Airlines, Northwest Airlines, and New York Air. Influential administrative law academics, such as Herz from Cardozo and Jerry Mashaw of Yale Law School, have also taught NYU Law students.

“At NYU,” says Gray, “there is a concerted effort to become *a* if not *the* leading institution for teaching the various facets of administrative law and regulatory policy.”

That effort has clearly grabbed the attention of students. Take Daniel Deacon ’10, who is now clerking for Judge A. Raymond Randolph of the U.S. Court of Appeals for the District of Columbia Circuit—the court that handles a significant proportion of cases that arise out of federal administrative agency actions. Deacon became interested in administrative law and policy while taking the Administrative and Regulatory State (ARS), the required 1L course, under Stewart. In his second year, he took a course with Katzmann on the administrative process and another with Revesz on environmental law. He later worked as a research assistant for Revesz and wrote a student note that was published in





the *NYU Law Review* in June on whether courts should decline to step in when an agency decides not to use its enforcement powers (the courts should generally not review those non-actions, he argued).

Deacon applauds the school's emphasis on the statutory side of law: "The type of practice most NYU Law grads will have will involve, at the least, statutes in the background on matters they are working on, whether in big law firms or government."

And consider Daniel Nudelman '12, who by the end of his first year was already planning to apply for a seat in the administrative law and policy clinic currently taught by Livermore and Revesz—for his *third* year. What propelled his interest over the course of one semester was taking ARS with Assistant Professor Samuel Rascoff; attending an all-day symposium organized by students from the *Environmental Law Journal* and the Environmental Law Society that in part addressed cost-benefit analysis and its alternatives for reviewing regulatory policy; and taking in a lunchtime forum during which Gray and Katzen discussed the executive orders they helped draft that spelled out how regulatory decisions would be weighed. "It's really cool to be here, because there's obviously a lot going on in this field," says Nudelman. The combination of courses and substantive extracurricular events, he says, "got me progressively more interested in that side of the law."



Revesz and Stewart

## SEEING THE BIG PICTURE

**FOR MORE THAN A CENTURY, FIRST-**year law students such as Nudelman have had to take essentially the same courses—torts, property, contracts, civil procedure. They can thank Christopher Columbus Langdell, the legendary legal educator, for that. He instituted a curriculum at Harvard in the late 19th century that was taken as gospel by just about every law school in the nation. Tradition-laden law schools largely resisted efforts to update the curriculum, except for adding a required constitutional law course here and there.

In the early 1990s, NYU Law's faculty met to consider a more radical proposal: to require an administrative law course for first-year students. Any time a faculty of a law school gathers to discuss changes in curriculum, you can expect angst and heated debate—and such was the case here. The professors were almost evenly split; the proposal lost by a mere one vote.

Ten years later the faculty took up the issue again, the debate no less fevered. Some professors pressed for adding constitutional law as a requirement, while others suggested adding international law or simply offering more electives. But Stewart, who joined the NYU Law faculty in 1992, argued strongly for a required course in the first year that would focus on statutes and their implementation by administrative agencies. "We live in an administrative, regulatory, bureaucratic state at all levels of government," he told his faculty colleagues, "and it impacts the lives of all of us."

Stewart, whom many experts consider the area's founding academic, specializing in environmental law, had long sought the course. He began teaching administrative and environmental law at Harvard Law School in 1971. Four years later he wrote what Revesz calls the seminal article in the area: "The Reformation of American Administrative



Law,” published in the *Harvard Law Review*. The piece conceived the idea, now accepted wisdom and practice, that people other than those directly affected by a regulation had a right to a hearing before an agency or the courts. Stewart followed that up another four years later with one of the earliest textbooks on the topic, *Administrative Law and Regulatory Policy*, co-authored with his Harvard faculty colleague, Stephen Breyer, who became a Supreme Court justice in 1994. It is currently in its sixth edition.

Pressing the administrative law and policy course requirement with Revesz at committee meetings, Stewart was well aware that the precedent wasn’t encouraging. Similar 1L administrative law and policy courses had been tried and dropped as a requirement at a handful of other law schools, such as Stanford and the University of Chicago, and most notably at Columbia, where it became an elective in 2002 after some 10 years. But, recalls Stewart, “I thought that it could be done right and could be successful, and if we didn’t try, we’d still be stuck with Langdell’s courses.”

The course, formally called the Administrative and Regulatory State, won out over Constitutional Law and debuted in Spring 2003. Today only a few schools—such as Vanderbilt and Harvard, both of which followed NYU Law’s lead—require a similar course. Columbia Law School Professor Peter Strauss, who fought unsuccessfully to retain his school’s required administrative law course, remains a strong advocate. “A curriculum that spends a whole year focusing student attention on common-law courts,” he says, “is misrepresenting what the legal system is about. This course teaches a set of skills lawyers need to have.” Seconds Judge Edwards: “Administrative law and the regulatory state are so prominent now in our system of government that the student ought to begin to understand that sooner rather than later.”

## SORTING THE PIECES

**SEVEN YEARS LATER, ARS REMAINS** a vibrant offering at NYU Law. Why has it succeeded here? For one thing, Stewart and Revesz determined early on that a particularly adept set of teachers, interested in public law and regulation, was needed to teach a class that doesn’t

look or feel like the other common law-based 1L classes. “It’s not an easy course, because in tort law, criminal law, contract law, you have certain substantive principles you can lay out,” Stewart says. “But this is a course about institutions and processes, so it’s more difficult for students to grasp.”

A second reason for the course’s success: Faculty agreed on a core set of principles and cases all would teach. They would refrain from turning it into a mushy, theoretical, political science-like course, the undoing at some other schools. At the heart of the principles was the idea that students would understand how Congress makes statutes and how courts and administrative agencies interpret them. At the same time, the professors would inject their particular interest in certain substantive issues, such as the environment, immigration, and education. That intersection allows them to illustrate administrative law points using cases and insights drawn from their expertise, keeping the course topical.

“Everyone is cooking chicken soup, but everyone adds his or her flavor into the recipe,” is how Professor Rascoff puts it. So Rascoff, an expert on terrorism, flavors his course by exploring how administrative law principles can be applied to national security issues. Cristina Rodríguez, who also taught the class at Harvard in Spring 2010 as a visiting professor, stirs in immigration cases. Rachel Barkow, a telecommunications lawyer before joining the faculty, sometimes seasons her course with a Federal

Communications Commission case study. Stewart, Roderick Hills Jr., and Brookes Billman (LL.M. ’75) pepper theirs with environmental cases, Title IX education issues, and tax examples, respectively. “Given who they have teaching it,” says Herz, “if the course can’t succeed at NYU, it can’t succeed anywhere.”

The professors’ differing specialties and perspectives provide students with a rich and nuanced understanding of how our government truly works. Consider how Barkow and Rodríguez teach the fundamental issue of delegation, the question of how and when Congress can delegate power to executive agencies. Barkow uses the 1935 Supreme Court decision known as

*Schechter Poultry* to mark what she calls the high point of the idea that Congress had little power to delegate. In that case the court struck down New Deal regulations governing chicken safety and worker wages. Oft cited is the remark Justice Louis Brandeis made to an aide to FDR:

“This is the end of this business of centralization, and I want you to go back and tell the president that we’re not going to let this government centralize everything.” It was a battle won, however, and not the war. From that point on, Barkow says, citing cases involving regulation of benzene and air quality, among others, it’s largely settled that Congress can delegate just about anything. Even still, the issue does not always sit well, as Rodríguez has shown in her class. She discusses a 2005 law allowing Homeland Security to do whatever it needed to build a border fence, including waiving federal, state, and local laws to override environmental and labor laws. Outraged opponents took the law to the top, but to no avail. In 2008 the Supreme Court, without comment, declined to hear an appeal.

Cost-benefit analysis is another staple of administrative law that gets tweaked differently by various professors. Cost-benefit is the now-routine practice, begun under President Reagan, of regulators weighing whether a proposed rule’s price tag exceeds its advantages.

Barkow discusses in class the notion of using cost-benefit analysis to a greater extent in criminal law. She believes the administration of criminal law should be no different from, say, environmental or securities regulation. A law that sets certain mandatory minimum sentences for drugs, for example, should weigh the cost—in the amount of prison beds, guards, buildings—against the benefits to society, she says. “Cost-benefit analysis doesn’t dictate a solution. But it is a very rational process for thinking about the pluses and minuses as opposed to using sensational anecdotes designed to charge up people’s emotions,” Barkow says, referring to media firestorms about crimes.

And both Barkow and Rascoff expose students to the idea that cost-benefit analysis should be applied to national security policies. Should airport security rules, for example, be subjected to the rigors of cost-benefit analysis? “Is there a role for this kind of ‘on the one hand, on the other’ approach in the national security base?” Rascoff asks in class.



Clockwise from left: Rodríguez, Rascoff, Barkow, and Pildes

## Building on the Foundation

NYU School of Law attracts notable practitioners, judges, and other professionals to teach upper-level administrative law and policy courses, in which they share personal insights and experiences, and encourage students to engage with actual case materials and to simulate practice.

Senior Circuit Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit and his senior counsel at the court, Linda Elliott, teach Federal Courts and the Appellate Process and the Art of Appellate Decisionmaking. In those classes, students question when courts can review governmental action and when they are obliged to defer to government actors. To drive the lessons home, the students go into mock courtrooms, where, after they have been briefed on real cases that are before the D.C. Circuit, they present oral arguments to their classmates and teachers. Students then divide into panels of judges, deliberating and writing opinions. "It is very, very intense," says Edwards, who has taught at NYU Law since 1989. "It is one thing to offer an intellectual critique of our system. It is quite another thing to have to comb through an actual case record to complete a brief, present an oral argument, or write an opinion."

Robert Katzmann was teaching law at Georgetown University, specializing in such topics as regulation and administrative law, when President Bill Clinton appointed him to the U.S. Court of Appeals for the Second Circuit in 1999. Since 2001 he has also been teaching Administrative Process, a seminar in which he guides students in dissecting the various factors that affect an agency in reaching a decision, whether it's the Federal Trade Commission or the Environmental Protection Agency.

"The administrative process is a many splendored thing," says Katzmann, an adjunct professor, "and can be approached through many lenses." He teaches students to look at the internal and external forces—the professional staffers

and lawyers on the inside, for example, and the president, Congress, and the courts on the outside. Students role-play as judges and critique opinions that Katzmann himself wrote, so he is able to replay the interaction between the courts and agencies.

C. Boyden Gray, former White House counsel to President George H.W. Bush, admits his bias when it comes to the importance of administrative law. He was trained as an administrative and antitrust lawyer from the beginning, and served as chair of the Administrative Law and Regulatory Practice section of the American Bar Association in the mid-1990s. He was also counsel to the Presidential Task Force on Regulatory Relief, chaired by then-Vice President Bush. "You cannot understand economic activity in the U.S. if you are a lawyer without understanding how congressional legislation is translated into the rules that apply to virtually every business entity in the country," Gray asserts. Its importance, he adds, can be seen in the D.C. Circuit, which mostly hears administrative law cases. "It's no accident," Gray says, "that the principal feeder [of justices] to the Supreme Court is the D.C. Circuit."

Gray taught at NYU Law for the first time in Spring 2010. His course, Energy, Environment, and Security: Law and Policy, pivoted on the idea that regulations primarily determine national and international energy policy. "It is a very tangled web of administrative rules and can only be understood in the context of very, very dense rulemaking," he says. This spring, Sally Katzen, administrator of

the Office of Information and Regulatory Affairs under Clinton, will teach a seminar whose title echoes Gray's statement: How Washington Really Works.

For five years, Distinguished Research Scholar and Senior Lecturer Michael Levine has taught a course called Regulation, Deregulation, and Reregulation that attempts to tie together regulatory theory with real-world problems. That intersection mirrors his career. As a student at Yale Law School, Levine wrote a note advocating airline deregulation, making him an early proponent of that concept. In the late 1970s, he was recruited to be chief of staff to Alfred Kahn, chairman of the Civil Aeronautics Board. From there he worked for airlines including Continental and Northwest, and became president and CEO of New York Air. He has also taught at Yale Law School. "Basically what I'm trying to do is give students the benefit of having seen the process from the government, business, and academic sides," Levine says. Academics, he says, tend to "compare imperfect markets with perfect visions of how things could work." People in the arena, he adds, tend to see markets as more or less as good as they are going to be. Levine tells students they'll confront both imperfect regulation and markets, requiring them to figure out how best to navigate through them. Last fall, in light of the economic meltdown, Levine revised his course to address financial services regulation—a perfect example of imperfects. —L.R.

From left: Gray, Edwards, Katzmann, Levine, and Katzen





At first, some students think it's dangerous to take chances with people's lives. Says Rascoff: "It becomes uncomfortable terrain for people to think there's a price tag that we're placing on security, even though it's just as uncomfortable that we're placing a price tag on people's lives when we regulate the economy or regulate safety in the workplace."

## CONNECTING THE PARTS

RASCOFF HAS A REAL-world background in national security. He was director of the New York City Police Department's 25-person intelligence analysis unit for two years before joining NYU Law's faculty in 2008. He has embarked on a project, funded by a two-year, \$100,000 grant from the Carnegie Foundation in 2009, that attempts to discover how much government officials understand about Islam and how they generate this knowledge. His point is that just as EPA regulators need to understand science, national security personnel need to understand Islam.

Rascoff continues to work on terrorism issues contractually with law enforcement agencies. Now that he's not managing intelligence agents, though, he says he has time to think and share the "bigger thoughts" with the folks who do security work all day.

In doing this, Rascoff lives up to one of the hallmarks of this group of teachers and scholars: engagement with our government and democracy, starting with Stewart. "Dick Stewart is the model of the publicly engaged academic," says Herz, who has taught the ARS course at NYU and in Spring 2010 taught the Advanced Administrative Law class. "On the one hand, he has this extraordinary academic career, and on the other, he has been very hands-on in the real world."

In an effort to reform environmental laws, Stewart co-founded in 2006 an organization called Breaking the Logjam, jointly funded by NYU Law and New York Law School. The logjam refers to the fact that the last major piece of environmental legislation came in 1990, with amendments to the Clean Air Act. "Our federal environmental statutes basically date back to the 1970s," says Stewart, who heads the group with NYU Law colleague Katrina Wyman and New York Law School professor David Schoenbrod. The organization's goal is to bridge the gap between the left and right with, Stewart says, "better, smarter ways to regulate."

Drawing on the views of 40 environmental scholars, the group has issued reports generally advocating market systems for dealing with pollution, including cap and trade for both greenhouse gases and conventional air pollutants. Stewart and Schoenbrod have conducted briefings and workshops with Congress and the administration as well as environmental, industry, and other groups. Stewart is realistic enough to know that today's raging political divisiveness poses a challenge to enactment of these ideas. But at least, he says, his proposals are getting seeded among important policymakers.

Stewart was also instrumental, along with NYU Law Professor Kingsbury, in starting the Global Administrative Law Project in 2005. Through conferences and papers, the group is exploring whether and how administrative procedures common in the U.S.—such as judicial review, transparency, and participation—can be applied globally. It's addressing the concern that global regulation, through agencies such as the World Trade Organization or the World Bank, has enormous impact on people on anything from the environment to trade to intellectual property piracy. Yet those agencies are often not subject to the basic administrative procedures that would enhance their legitimacy.

"You get a lot of very important decisions that are made beyond the state without the normal elections or some sort of legal review," Stewart says. Developing countries in particular, he notes, may not have the resources and wherewithal to effectively participate in regulation making. To strengthen that capability, the GALP has held conferences on the topic in such cities as Buenos Aires, New Delhi, and Cape Town. Judge Katzmann, who teaches an upper-level seminar on administrative law at NYU, calls the GALP "path-breaking" in how it created a community of scholars, lawyers, and policymakers around the world to examine administrative law issues. Indeed, Stewart proudly notes that global administrative law has become in effect a trademark in legal literature, as that community recognizes the need for better regulatory policies around the world. GALP plans to issue specific recommendations after its current fact-finding phase.



If Stewart wrote the seminal article on administrative law in 1975, then Revesz might be considered among the second generation of administrative law and policy scholars—and one of the most widely followed, especially on environmental regulation and cost-benefit analysis. On two occasions, in 1994 and 2007 (the latter with a student, Nicholas Bagley '05), Revesz's writings have won the American Bar Association's award for best article published during the previous year in the administrative law area. Only three other scholars have gained that double distinction: Jerry Mashaw, Columbia Law School's Thomas Merrill, and Harvard Law School's Cass Sunstein, now the administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs.

Revesz is notably generous with his time and expertise in mentoring students and academics in the administrative law area. Bagley recalls how Revesz assigned him difficult writing assignments that quickly stretched him. "He'd then look over what you did, sit down with you, and walk through what worked, what didn't, and what I might do to make the piece stronger," Bagley says. "Then I'd try again."

Rascoff, too, praises Revesz for guiding him. In 2001 Revesz offered Rascoff a fellowship at the Frank J. Guarini Center on Environmental and Land Use Law, and the two collaborated closely on a law review article about risk regulation, during which Revesz "constantly pushed me—in his unfailingly gentle way—to deepen my thinking about law and policy," Rascoff remembers. "He showed me by example what rigorous legal scholarship is all about."

Revesz's current outreach into the policy world centers on his work in cost-benefit analysis, an interest that goes back to the

Clinton years, when he served on a science advisory board to the Environmental Protection Agency. He recalls how he noticed something odd then: No environmental groups ever showed up to testify about EPA's guidelines for the preparation of cost-benefit analyses. Yet trade associations representing polluters frequently came to present their views, allowing them far more influence to shape regulations to their liking. Environmentalists were so inherently opposed to weighing costs and benefits of regulations that they absented themselves from the discussions. In their view, it's wrong to even try to put a dollar value on lives.

Katzen, who headed the Office of Information and Regulatory Affairs in the Clinton administration and will be a visiting professor at NYU School of Law in Spring 2011, also saw this firsthand. "We in the Clinton administration were thinking how to do cost-benefit analysis, and labor, the enviros, and public safety folks were conspicuously absent," she recalls. "Who came to the table? The people who believe in mathematical precision. Where were the people to talk about how to do it in a more sensible way? They decided not even to participate."

The frustrating experience convinced Revesz, along with Liver-

more, then a student, to write a book that

challenges the liberal camp to dive into cost-benefit analysis. In their 2008 book, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, they argue that cost-benefit analysis, when done properly, can in fact thwart anti-regulatory forces and arrive at progressive regulations. "Ricky was not buying into those who are totally enamored of cost-benefit analy-

sis," Katzen says, "but at the same time, he was not buying into the more liberal wing that says, 'Why do any analysis?' He basically says it's the best information we have, and let's see if we can make it better."

To extend these ideas outside academia, Revesz and Livermore founded the Institute for Policy Integrity (IPI), also in 2008, with grants from the Hewlett Foundation and the Rockefeller Family Fund, among others. Staffed by lawyers and economists, IPI publishes studies, files amicus briefs, and meets with NGOs to discuss how they can employ cost-benefit analysis in their areas. Says Katzmann: "To my knowledge, there is no other law school that has brought to the fore in such a focused way this important aspect of decision-making."

Early in the Obama administration, the institute offered its suggestions about how to fix the government's regulatory review process, including the cost-benefit component, essentially left over from the Clinton era. The institute has devoted considerable time to climate change, releasing a study in 2009 that looks at the way the EPA can regulate greenhouse gases under its existing authority and discussing the design of attractive cap-and-trade schemes. And it has weighed in on such disparate issues as the controversy affecting control of

Internet content known as Net neutrality, the hazards of mountain-top mining, and the number of hours a trucker can safely drive.

The institute is also trying to spread its cost-benefit gospel to developing countries, holding conferences in Chile, the Dominican Republic, and China. In such little-regulated countries, new environmental regulation would bring massive benefits compared to its cost.

Richard Pildes, Sudler Family Professor of Constitutional Law, is another example of a faculty member heavily engaged in the real world—or, as Revesz puts it, proof that "we're not just writing articles nobody reads." He notes that Pildes has played a role in several of the most important administrative law issues to come before the Supreme Court during the last 10 years.

The most significant was the attack on the constitutionality of the Sarbanes-Oxley law, enacted in 2002 after the financial crisis brought on by the Enron debacle. Plaintiffs argued that the regulatory board created by the law to police the accounting profession was too independent of the president (he had no authority to remove members) and thus unconstitutional under the separation of powers doctrine. Pildes, representing seven former chairmen of the Securities and Exchange Commission, including Harvey Pitt and Arthur Levitt, filed amicus briefs supporting the law—from the trial court up to the Supreme Court, over a period of several years. His argument: The disputed agency (the Public Company Accounting Oversight Board) was completely under the control of the SEC. So, "[a]s long as the SEC itself is constitutional, the SEC-Board structure is constitutional," Pildes stated in his 2009 brief. In a June decision that delighted Pildes, the court rejected all the constitutional attacks, save one minor defect, leaving the accounting board in place. In a separate opinion, Justice Breyer cited both Pildes's amicus brief and an article on the SEC-Board structure that he published in 2009 in the *Vanderbilt Law Review En Banc*.

"It's the kind of issue," Pildes says, "that goes to the heart of the relationship between the Constitution and the structure of administrative governance—exactly the kinds of things we teach in the first-year course." Pildes and other professors have used the case itself in class; Barkow even used it as an exam question one year. Indeed, Pildes adds bemusedly, the facts of the case are so germane that "one could imagine making it up to help students sharpen up their understanding of the various issues."

In another high-profile Supreme Court case, in 2005, Pildes won in a decision that divided the Court 7 to 2 and sharply rebuked the U.S. Tax Court for concealing documents and findings from people with cases before the court. The broader issues addressed questions of the institutional structure of the Tax Court and how it conducted trials. Pildes recalls that during the appellate stage, the judge, an administrative law expert, grilled him about the "classic" administrative law cases from the 1940s and '50s that are always taught in the ARS class.

Pildes is currently involved in another potential Supreme Court case that raises the administrative law issues of due process and fair treatment. Along with Paul Clement, a former U.S. solicitor general and adjunct professor at NYU Law, he is representing a health insurer in a dispute with a Puerto Rican taxing authority.

The ascension of the Obama administration, along with the reality check of the financial crisis, brought a new focus to the role of government regulation—creating opportunities for NYU professors to influence the debate. Barkow was asked, for example, to weigh in on Obama's plan to create a Consumer Financial Protection Agency to oversee financial instruments such as mortgages and credit cards, part of the proposed overhaul of the nation's financial regulation system. Given that she specializes in criminal







## The Libertarian Among Us

At lunch at a restaurant near his Central Park West apartment, Richard Epstein, Laurence A. Tisch Professor of Law, is explaining his view of the regulatory state. He emphasizes that, his libertarian stance notwithstanding, he is not against all regulation. It's just that, he says, "most of the modern regulatory state stuff is wrong." Regulations, he says, are poorly designed, excessive, incoherent, irresponsible, perverted. All those adjectives arrive before the meal does.



Visiting each fall since 2005 to teach a variety of courses, and joining the faculty full-time this year, Epstein is an unwavering, conservative scholar whose deeply reasoned and blunt views on regulation clash with those of most other faculty members, thereby enriching the discourse. "Granted, he's a foe of the administrative state, but he's the most important thinker in opposition to the regulatory state we have in the country," says Professor Rachel Barkow.

Epstein will teach a course in Spring 2011 (along with Bruce Kuhlik, general counsel of Merck) on one of the bulwarks of the regulatory state: the Food and Drug Administration. Describing the course, Epstein lays out a conventional-seeming

syllabus—examining how products are approved, clinical trials, recalls—until he adds, "What's right and wrong about the FDA." There's no doubt which side Epstein takes. But just in case, Epstein offers: "I'd blow them up." He then methodically dissects the agency and its failings, which he says range from "permit-itis"—too many permits required—to "ossified" scientists and bureaucrats who have neither the capacity nor expertise to regulate drug-making. Of the FDA's propensity to deny or drag out drug approvals, he says, gesticulating, "It's like carnage as far as I'm concerned."

Epstein's best-known work came in 1985 with *Takings: Private Property and the Power of Eminent Domain*. His insistence that government must respect and compensate private property rights is a springboard to his view of regulation.

The professor's underlying principle is that any regulation must leave all affected people better off than with no rule. More specifically, Epstein says regulations ought to come in later rather than sooner. So if you're planning on putting up a manufacturing plant next to a house, you should not force the builder to go through an exhaustive permission process first. Under his preferred regime, "I can't stop you from putting in a foundation,"

he says. "But once pollution comes in, I can shut you down." The beauty of this, he says, is that the builder of the plant understands that threat—and won't want to construct here in the first place. "What on earth is there to commend the current system?" he asks, sounding exasperated. Although Epstein takes issue with just about everything emanating from the Obama administration, at least the president's policies are giving Epstein plenty of material to work with—and future courses to teach.

A sampling of Richard Epstein's positions on current regulatory issues:

**Health-care overhaul:** "It's going to craterize the system," he says. "There's nothing in this bill that controls costs."

**Financial regulation:** "I have no confidence this federal government will come up with a system of regulation that will do the job," he says. Rather, Epstein would like to see a decent bankruptcy system to handle the large cases.

**Consumer protection agency:** "It will end up hurting the very people whom they purport to help," he says, referring to credit card and other loan restrictions.

**Global warming:** Insisting that too many uncertainties surround the theory to commit billions of dollars to decrease carbon levels, he would instead focus on reducing methane. —L.R.

law, and not in business or corporate law, the invitation was a testament to her insights into administrative design. Testifying in July 2009 before a House subcommittee, she urged a series of changes in the legislation that generally would make it more independent of the president and less dominated by any one political party. She urged that no more than three of the five members of the agency hail from the same political party. The addition of different political viewpoints, she said, will temper the common tendency of like-minded people to adopt extreme positions.

In the spring, Barkow was named to a panel that will advise the Manhattan district attorney's office on how to avoid wrongful convictions. The assignment is a species of administrative law, she notes, and in fact fits nicely into the longtime focus of her scholarship: how the theories and practices of administrative law can be applied to the criminal justice system, from sentencing to prosecutors' offices.

Consider the question of how to police federal prosecutors, a topic Barkow explores in a February 2009 *Stanford Law Review* article, among other papers she has published on this topic. Prosecutors represent, she writes, a "glaring and dangerous exception" to the separation-of-powers idea. Immensely powerful, they can both advocate decisions and make final adjudications (95 percent of all federal cases are settled in nontrial pleas). As she points out, "There are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate new pleas, or to set their office policies."

How to prevent abuses? Barkow notes in her article that lawmakers are reluctant to rein in prosecutors for fear of looking soft on crime. So she proposes using an administrative model of checks and balances because, after all, prosecutors are effectively regulators. Think about how they often strong-arm corporate executives into agreeing to deals rather than have their companies face potentially crippling criminal charges. "If I say I'm going to charge you unless you do the following things—change your business, install a monitor—this looks a lot like regulation," she says, describing the main thrust of her article. (In 2009, "Regulation by Prosecutors" was the inaugural symposium of the Center on the Administration of Criminal Law, where Barkow is faculty director. Key participants included Mary Jo White, former U.S. attorney for the Southern Dis-

trict of New York, and James Comey, former U.S. deputy attorney general under John Ashcroft and Alberto Gonzales.) The safeguard she advocates, borrowed from administrative policy, is to separate the individuals who carry out the investigation from those who decide whether to file charges, to avoid the appearance and reality of bias. This would work better, she says, than other politically difficult ideas often discussed, such as judicial review or a limit on plea bargains. She argues that her approach should appeal to prosecutors, as it keeps decision-making within their offices.

In a paper published in the *Yale Law Journal* in December 2009, Rodríguez also weighs in on the separation-of-powers issue, but by looking at the issues through an immigration lens. With her co-author, Adam Cox, a University of Chicago Law School professor, she argues that although the president has power over whom to deport, the chief executive is lacking authority on whom to admit; Congress has that responsibility. That is illogical as well as slow. "We need to change the way we think about how to admit immigrants, especially immigrant workers," she says. "The current system is too sclerotic, too slow to react, not responsive to conditions in the world."

At the Migration Policy Institute, a Washington, D.C., think tank where she is a nonresident fellow, Rodríguez works on the controversial issue of who should enforce immigration law—local police or federal authorities. One key question she's studying is how the Department of Homeland Security can maintain authority over state and local officials who have, in some high-profile cases, relied on racial profiling.

**TOPPING OFF** You can make the argument that Craig Wenner, who will graduate from NYU Law in Spring 2011, has already won his first administrative law case. Working over the summer after his 1L year for Revesz and the Institute for Policy Integrity, Wenner helped research and write an amicus brief using cost-benefit analysis to attack a Bush administration rule setting trucker driving hours. The regulation was ultimately withdrawn by the Obama administration, leading to the dismissal of the case. Though victorious, Wenner would have liked to see how his legal arguments would have stood up in court.







Like other students, Wenner expresses some amazement that administrative law wasn't required in years past. "The regulatory state is one of the few aspects of law that really touches individuals on an everyday basis," he says. "And the day-to-day practice of lawyers generally always involves government agencies to some degree."

Nicholas Bagley, who was in that first-ever ARS class in 2003, worked from 2007 to 2010 at the Department of Justice. Almost every day, he says, he harked back to the lessons learned from Richard Pildes when he dealt with cases involving federal agencies such as the Federal Aviation Administration and the Federal

Bureau of Investigation. "Administrative regulation is pervasive," he says. And lawyers practicing in the private sector are no different in their need to understand the subject, asserts Bagley. In a nod to Langdell's time, Bagley says: "I think it's a difficult argument to sustain nowadays that property—to name just one of the tried-and-true courses—is more fundamental to the work of a lawyer than administrative law."

One of the Law School's most recent graduates underscores this point. At the White House, David Kamin '09 is special assistant to the president on economic policy at the National Economic Council. But from 2009 to 2010 he was adviser to Peter Orszag, director of the Office of Management and Budget. In that role, he was a policy guy on budget matters without an explicitly legal role—yet administrative law issues were never far from his job. His ARS course and advanced administrative law class with Rachel Barkow proved "incredibly helpful." When, for instance, Obama proposed a regulatory body like a Medicare Commission, Kamin had a knowledge base that at least allowed him to understand the discussions. "As you develop a proposal, it's very helpful to know the ways that regulations get formed, the ways regulations get litigated," he says. "If someone says this is a delegation issue, you understand what they are talking about."

Kamin pays the ultimate student compliment to his teacher when talking about meetings in which an administrative law issue arose: "I've often thought of writing to Professor Barkow and saying, 'You know, I'm damned glad I took your class!'" □

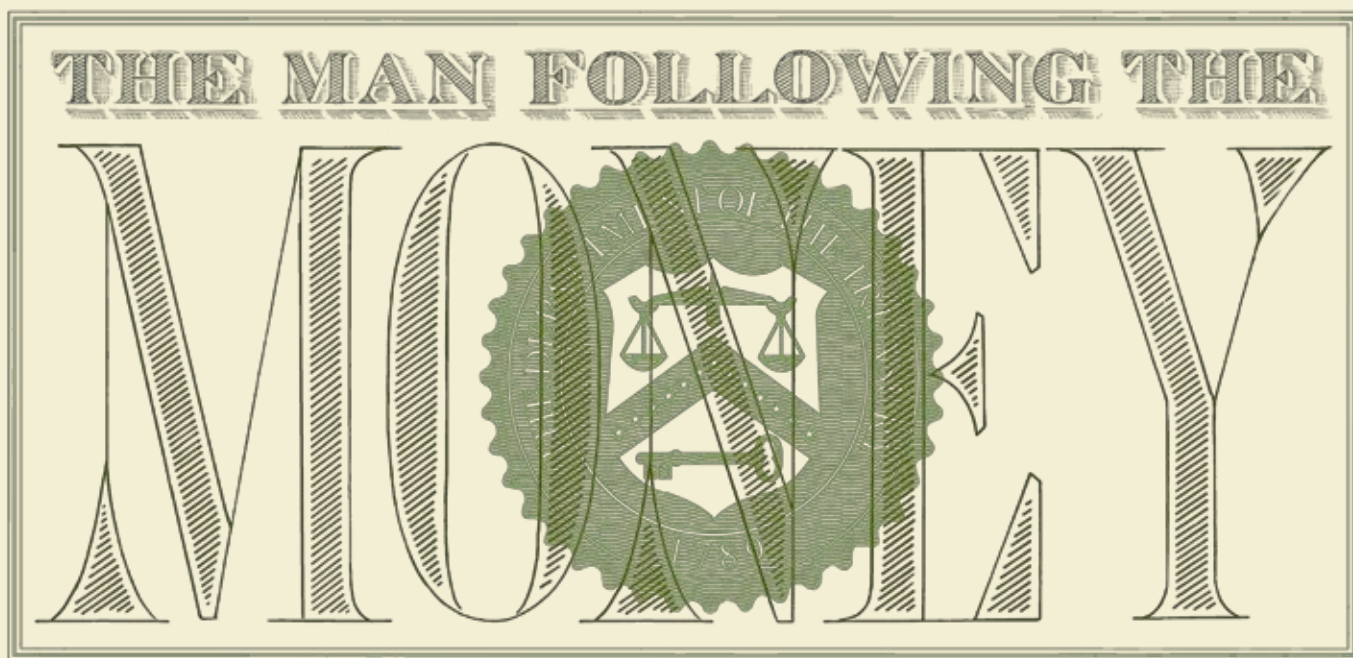
*Larry Reibstein is an editor at Forbes Media.*

EXIT>





A successful former prosecutor of international drug lords and white collar criminals, Neil Barofsky '95 doesn't scare easily. But can the special inspector general for the Troubled Asset Relief Program protect the public purse from Wall Street's profiteers?



WALK INSIDE THE NONDESCRIPT RED TOWER on the corner of 18th and L in downtown Washington, D.C., and you will find two rent-a-cops standing guard in a lobby that wants to be impressive but doesn't quite hit its mark. The security badges, rather than the architecture, give the only hint of the power residing within. They read "OFS," for the Office of Financial Stability of the Department of the Treasury.

The atmosphere on the fourth floor isn't much different. Low ceilings, high cubicle walls, and a deafening silence suggest the kind of action you might find in the quarters of a paper-pushing bureaucracy. It's just the opposite, though: this is the office of the special inspector general for the Troubled Asset Relief Program, or SIGTARP, where a small number of government employees are doing their utmost to *save* the American people billions of dollars. And no one is working harder to that end than Neil Barofsky '95.

Since his confirmation as the country's newest special inspector general in December 2008, Barofsky hasn't had much time to catch his breath. After spending more than eight years as a prosecutor in the United States Attorney's office for the Southern District of New York, he was tasked by President George W. Bush with keeping tabs on what ultimately became a possible \$3 trillion in disbursements under the TARP—better known as the bailout of Wall Street and the auto industry. It's certainly the most ambitious undertaking the 40-year-old lawyer has ever tackled, and his focus is unwavering. While he has a corner office with a view, he still hasn't had

time to move in properly. His workplace has a not-quite-unpacked feeling, and even the framed copy of his presidential appointment leans on a window ledge, next to a signed photograph of New York Yankees legend Don Mattingly.

Dressed soberly in gray pants, a white shirt, and gray tie on one of February's seemingly endless snowy days, Barofsky is remarkably subdued when explaining what it's like to try to hold the most powerful people in U.S. finance to account, from banking CEOs all the way up to the secretary of the treasury and the chairman of the Federal Reserve. He seems unfazed by the act of speaking truth to power, but that's not too surprising: he has faced far more terrifying adversaries than the pinstriped crowd—including drug smugglers known for disemboweling people who get in their way.

WELL BEFORE 2008, Barofsky already had an enviable résumé. A graduate of the University of Pennsylvania and the NYU School of Law, he had distinguished himself in the New York legal community as an excellent trial lawyer, taking on everybody from drug pushers to white-collar thieves. The way things were going, he might have been a candidate for U.S. attorney one day, or, at the very least, he was setting himself up for a cushy partnership in one of the city's prestigious law firms.

And then came the financial crisis. Like many Americans, Barofsky has found his career inexorably changed by the near-meltdown of Wall Street and the global economy as a result of the

by DUFF McDONALD

Portrait by JOHN EARLE | Illustrations by STEVEN NOBLE

bursting of the real estate bubble. But unlike the tales of a bunch of erstwhile Wall Street masters of the universe whose flameouts were a spectacle for the ages, Barofsky's story is that of a remarkable talent plucked out of relative obscurity at a desperate time.

When President Bush authorized Treasury Secretary Henry Paulson to start throwing mountains of money at the crisis—the TARP was initially conceived as a \$700 billion bailout, and Paulson spent \$125 billion in a single meeting with nine large financial firms—Congress had the foresight to create a position that would track just where the money went. The new special inspector general's office would conduct, supervise, and coordinate audits and investigations into the use of TARP money. That's when Barofsky first came to the attention of those outside the legal community in New York and Washington.

Working with a bare-bones staff—by May 2010, he had about 118 people working for him and had budgeted a relatively puny \$48 million—Barofsky has shown a degree of productivity that boggles the mind. Since the start of 2009, his office has conducted nine audits of TARP spending (12 more are ongoing), launched dozens of investigations into potential fraud, and produced thousands of pages of reports to Congress.

What's more, the tenacity with which Barofsky has stayed true to his stated mandate has resulted in a startling degree of public awareness of the results of the SIGTARP office's work. The cover of each of its quarterly reports to Congress includes the tagline "Advancing economic stability through transparency, coordinated oversight, and robust enforcement." There is progress on all three fronts.

When he testified before the U.S. Senate on February 5, 2009, Barofsky made it quite clear that his office would not rubber-stamp Treasury decisions when it came to disbursement and oversight of TARP funds. Whereas in the heat of the moment, Treasury had quite simply given hundreds of billions of dollars to the country's largest banks with few restrictions on how that money was to be used, Barofsky signaled that he would insist on transparency, starting with the seemingly obvious request to banks that they provide details on what they planned to do with any funds they received. Remarkably, that was something Treasury hadn't thought to ask.

"When I came on board on December 15, 2008, within eight days I made a recommendation that Treasury start requiring TARP recipients to report on how they were using the funds," Barofsky said at the 2009 NYU Law Global Economic Policy Forum and Law Alumni Association Fall Lecture last November. "That recommendation was rejected by the Bush administration and has been rejected by the current administration. That has been indicative of a bad attitude toward basic transparency." Barofsky has been a thorn in the side of both the Treasury and the Federal Reserve ever since.

But that's part of the job. Another part: coordinating efforts with a veritable grab bag of other government bodies, from the Congressional Oversight Panel, headed by Elizabeth Warren, to the comptroller general of the United States (who is the head of the General Accounting Office), the FBI, and the Department of Justice. A recent inquiry into potential fraud surrounding Bank of America's disclosures in the lead-up to its controversial merger with failing investment bank Merrill Lynch, for example, conducted in conjunction with New York State Attorney General Andrew Cuomo, resulted in civil charges being filed against Bank of America and its former CEO Ken Lewis in February.

Enforcement, by definition, has come last. Barofsky, who refers to his office as "the cop on the beat" for the TARP, has 105 open investigations as of July 2010 into potentially fraudulent use

of TARP funds, but only a handful that have been successfully concluded. Barofsky doesn't see anything wrong with that. "You can't investigate a crime until it's actually occurred," he explains with a smile. "TARP only came into being in late 2008, so the majority of crimes we're looking into occurred in 2009. Securities and accounting fraud cases also take a lot of time. We're just getting started here." A hotline to report fraudulent or wasteful use of TARP funds has received more than 10,000 calls as of May, leads from which have been behind some 27 investigations.

Despite the underwhelming office space, the insignificant budget, and the relatively new position in Washington's power grid, Barofsky has, since the moment he became SIGTARP, had his voice heard as if he were one of those Looney Tunes characters speaking through a megaphone. (Or maybe a Fox cartoon: friends joke that Barofsky resembles Homer Simpson once his five o'clock shadow kicks in around noon.) But no one who knows him, from his family to law school professors and longtime colleagues, is surprised that he's achieved so much in such a short period of time. It's what he's been doing his whole life.

**N**EIL MICHAEL BAROFSKY was born in April 1970 in northeast Philadelphia. For the next 16 years, his would be a peripatetic life. His father worked in the travel business, which necessitated that the family—parents Stephen and Gail, and Neil and his two older sisters—move to Wyndmore, a suburb of Philadelphia, when Neil was three years old; to Scarsdale, New York, when he was nine; to Minnesota when he was 15; and finally, when he was 16, to Boca Raton, Florida, where Stephen and Gail opened their own travel agency.

While he says he had typical boyhood fantasies of being a fireman or a policeman when he grew up, Barofsky also remembers wanting to be a lawyer at a "ridiculously young age." He says his mother still keeps the fortune from a cookie Neil opened when he was 12 that read, "You Will Be a Great Lawyer One Day."

Thinking back, his high school friends recall clues that suggest the anonymous cookie fortuneteller was onto something. "Neil would always win the debate," says David Scharnweber, a classmate at Spanish River High School who remains a close friend. "He could craft reasonable, compelling arguments from the very beginning." (Barofsky says simply: "I had a big mouth as a kid.")

It wasn't only the teenager's verbal skills that garnered notice. He was a standout in mathematics as well. Barofsky's math teacher—and pal David's mother—Terry Scharnweber remembers a precocious mind. "He always asked the questions that needed to be asked," she recalls. "He took nothing for granted, always wanting to know what was behind the math." ("I was a mathlete!" Barofsky says with a bashful smile more than two decades later.) He would take Advanced Placement classes and win a handful of regional academic awards in his two years in the Boca Raton school district.

This combination of verbal and mathematical fluency would put Barofsky in good stead to handle the intricacies of his position as SIGTARP—a job that quite literally involves sifting through mountainous volumes of numbers and then somehow translating the results into English.

Barofsky says there was more talk of sports around the family's dinner table (he remains a fan of the NFL's Miami Dolphins to this day) than there was about politics or social injustice. Still, 20 years before Bush would nominate Barofsky to the job of a lifetime, the high school senior would include "Republicans" in his list of dislikes in the school's yearbook. "That will always haunt me," he says, laughing, in 2010. "But I have overcome my dislike of Republicans. I count many as my friends today."



During his four years as an undergraduate at the University of Pennsylvania, Barofsky maintained his unrelenting work ethic. Penn is chock-full of Ivy League overachievers, but Barofsky managed to stand out even among those peers by earning a dual degree: a bachelor of science in multinational management, from the undergraduate division of Penn's Wharton School, and a bachelor of arts in international relations.

Barofsky joined a fraternity—Tau Epsilon Phi, or “TEP”—and enjoyed Penn’s urban campus in West Philadelphia. Jonathan Bing ’95, a fraternity brother and later a law school classmate, says Barofsky “was pretty well destined to do something important and intellectual down the road.” Bing, now in his fourth term in the New York State Assembly representing the 73rd District in Manhattan, hastens to add, “He had fun and enjoyed college, but he was also pretty intense, even then.” Indeed: Barofsky graduated magna cum laude.

THE WHARTON SCHOOL supplies much of Wall Street’s white-collar labor force. Barofsky headed north too, but he entered NYU Law in the fall of 1992.

The decision to attend NYU, he says, came down to a combination of the reputation of the school itself as well as its location. “To be 22 years old and living in subsidized housing in the West Village... there’s nothing better than that,” he recalls. “Law students are neurotic people by nature, and it’s very easy to get sucked into the school, and your life becomes nothing but law and law students. That’s not the case at NYU. There’s just way too much going on around you.”

While he enjoyed and excelled in the majority of his classes—Barofsky graduated magna cum laude from law school too—one particular course comes to mind when he considers how NYU may have shaped decisions he made after graduation: Criminal Procedure, taught by Adjunct Professor Andrew Schaffer.

“[Schaffer] was one of the few professors at the time who were teaching with a pro-government stance,” Barofsky recalls. It was a controversial class, with Schaffer delivering a perspective of how the government managed to navigate around such hot-button issues as the Fourth Amendment, instead of the more typical perspective of how a defendant might use it to wiggle out of a legal corner. “Listening to his war stories, I remember thinking that this was the kind of thing I wanted to do,” recalls Barofsky. (“I tell my students every year that I am likely more pro-prosecution than all but about 10 of them,” laughs Schaffer. “It’s a good bet Neil was among the 10.”)

Barofsky did manage to find the time to enjoy what New York City had to offer, including taking in as many games as he could of his beloved New York Yankees. (He’d been a fan since moving

to Scarsdale.) He maintained his allegiance to the Dolphins, however, and would brazenly cheer for them during their once-a-year pilgrimage to Giants Stadium to play the New York Jets. Along with classmate Jonathan Klarfeld ’95, now a deputy assistant director at the Federal Trade Commission, he attended the now-legendary 1994 game during which hall-of-fame quarterback Dan Marino faked a spike with just seconds left, caught the Jets’ defense napping, and threw a game-winning touchdown. “He was not a good sport that day,” laughs Klarfeld, a Jets fan.



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**REMEMBER A DAY** 1 Barofsky at age three, in northeast Philadelphia; 2 Spanish River High School yearbook photo; 3 with David Scharnweber at high school graduation, 1988; 4 move-in day at the University of Pennsylvania, with mother Gail and sisters Karen and Vickie, 1988; 5 before a mixer, with TEP fraternity brothers Eric Levin, Michael Shusterman, Jonathan Bing '95, Mark Lynn, and David Tamres, 1991; 6 with father Stephen, circa 1990; 7 at a 2007 family wedding in Puerto Rico, with his girlfriend Karen, now his wife.

He also fed an insatiable desire to see live music, his tastes in which run from classic rock—Barofsky is probably one of the few people working in the Treasury Department today who saw Pink Floyd play “The Great Gig in the Sky” at Yankee Stadium in June 1994—to 1980s new wave band Echo and the Bunnymen. His favorite? “It changes every day,” says Barofsky. “But right now, I’m back to the Clash, otherwise known as the Greatest Rock Band of All Time.”

**I**N JANUARY 2009, the *New York Times* referred to the office of the United State Attorney for the Southern District of New York as “one of the city’s most powerful clubs” and home to “perhaps the most prestigious federal prosecutor’s job outside Washington.” While some of the office’s assistants are hired straight out of law school, the bulk of them are plucked from the city’s elite law firms themselves. After graduation from NYU Law, Barofsky decided to take the latter route.

He landed a job in the litigation department at Weil, Gotshal & Manges. In short order, he was drafted to the legal team representing a number of cable television networks in a dispute over the appropriate rate they should pay the American Society of Composers, Authors, and Publishers (ASCAP) for music licensing. While Barofsky and his colleagues were representing high-profile clients such as MTV Networks, ESPN, USA Networks, and the Disney Channel, he feared the case might overwhelm his early career and prevent him from building the résumé that would position him best for the highly coveted gig as an AUSA.

A colleague, Chris Morvillo, saw Barofsky’s frustration at not having an opportunity to work a wider range of cases and suggested that he speak to Morvillo’s father, Bob, one of the founding partners of white-collar litigation firm Morvillo Abramowitz. Both Morvillo and Elkan Abramowitz ’64 had worked in the Southern District office—first as AUSAs and later as chiefs of the Criminal Division—and the firm had a singular reputation as a kind of finishing school for those seeking admittance to the SDNY.

“These guys pretty much invented white-collar prosecutions when they were AUSAs,” says Barofsky. “And then they went on to invent white-collar criminal defense.” A job at Morvillo Abramowitz held not only the promise of experience on the kinds of cases that he wanted to work on but, of equal or greater importance, the possibility of a recommendation to the SDNY from legendary figures in the field. After spending just 14 months at Weil Gotshal, Barofsky decamped for Morvillo Abramowitz. (He may have been right about the ASCAP case as well: litigation dragged on for more than a decade.)

Barofsky got the immersion in white-collar litigation that he’d been looking for. An early case: In 1997 the firm acted as defense counsel for Josef Goldstein, son of the former president and owner of 47th Street Photo, who was charged with defrauding the high-profile electronics retailer’s creditors. Goldstein and three co-defendants decided to risk a jury trial. It was the wrong decision—all were convicted—but Barofsky remembers the six-week trial as a tremendous experience. “I learned a ton,” he recalls, “both during the trial itself and in the long lead-up to it, especially how to use the tools of federal criminal practice in a practical way.”

Barofsky worked alongside Abramowitz himself during the trial, handling a few witnesses and even arguing a motion. He

impressed the partner with his fledgling courtroom abilities. “Neil had an ability to synthesize a ton of material and explain it to the jury in an easy-to-understand way,” recalls Abramowitz. “His verbal skills, in particular, were well beyond those of many of his contemporaries.”

Just a few years out of law school, Barofsky was already demonstrating a relentlessness that might be grating were it not for its lack of sharp edges. He was forceful but not quite abrasive, and the same holds true today. Barofsky is *that* guy—the one who some way, somehow, usually avoids being irritating, even when disagreeing with you.

After two and a half years apprenticing for the white-collar pioneers, Barofsky had gotten what he set out to obtain: the ability to



**CRISIS POST-MORTEM** *At the 2009 Global Economic Policy Forum and Annual Fall Lecture, Barofsky was joined by fellow Law School alumni Sara Kelsey ’76, former general counsel of the FDIC; Eric Dinallo ’90, former NYS superintendent of insurance; Stuyvesant P. Comfort Professor of Law Geoffrey Miller; Kenneth Feinberg ’70, then-special master of executive compensation under TARP; and Adjunct Professor Alan Rechtschaffen.*

think like a defense lawyer if and when he was putting together a criminal case from the other side of the courtroom. “Having that defense perspective, that ability to scope out the weaknesses in a criminal case, is an essential tool in the prosecutor’s toolkit,” he says.

“Neil came in more mature than many of the young lawyers we hire,” recalls Bob Morvillo. “He hit the ground running. While he was both careful and diligent, I think one of the reasons we recommended him so highly to the U.S. Attorney’s Office was that he was also creative. Give him a task, and he didn’t just give you back the four corners. He would give you the context in which the project should take place.”

In the fall of 2000, the 30-year-old was offered the job he’d been aiming at for almost five years: then-U.S. Attorney Mary Jo White named Barofsky an AUSA. He would spend more than eight years in the office—working under four different U.S. attorneys—and handle several extremely high-profile cases. He would also narrowly avoid being kidnapped and killed by narco-terrorists.



BAROFSKY'S TENURE AS AN AUSA started the same way as every other new assistant's did: he spent a year in the general crimes division, dipping his toe in the prosecutorial waters and trying to learn as much as he could from his more seasoned colleagues. Along with his colleagues, Barofsky moved to narcotics in his second year. Like many who have trodden the same path, he found the action energizing enough that he decided to stick around, and he joined the International Narcotics Trafficking team.

Over the next three years, he would prove an aggressive lawyer, unafraid to bring charges or pursue a difficult case. Nor, for that matter, was he afraid to challenge his superiors. "He does what he thinks he should do even if it leads to clashes with those above him," says Anthony Barkow, a former SDNY colleague and current executive director of NYU Law's Center on the Administration of Criminal Law. "Still, those same people wanted him on their cases because of his tactical, strategic, and professional judgment."

Sifting through the voluminous indictments, extraditions, and convictions that Barofsky and various colleagues successfully brought against drug smugglers of every stripe between 2001 and 2005 can cause one to revise one's first impression of Barofsky. In person, he comes across as lawyerly, a little on the bookish side. What doesn't come across, though, is how boldly and fearlessly he pursues criminals to bring them to justice.

He prosecuted heroin kingpin Ramiro Lopez-Imitola for importing more than 2,000 kilograms of heroin, worth some \$200 million, into the U.S. Lopez-Imitola is the kind of guy who, when told that one of his drug mules has died in Miami, offers a henchman \$10,000 to cut the body open and retrieve 88 pellets of heroin from his intestinal tract. Lopez-Imitola was sentenced to 40 years in prison.

But prosecutions against the likes of Lopez-Imitola were merely a warm-up to one of the most groundbreaking drug smuggling cases ever brought in a U.S. court: Barofsky's investigation and prosecution of 50 leaders of Revolutionary Armed Forces of Colombia—known by their Spanish acronym, FARC—on seminal narcotics charges. The Department of Justice charged FARC with importing more than \$25 billion worth of cocaine into the U.S. and other countries, and accused them of supplying more than 50 percent of the world's cocaine. It was the largest narcotics indictment ever returned. "I think we redefined the FARC, which was one of our goals," Barofsky later told the *Washington Times*. "The press stopped calling them freedom fighters and started recognizing them for what they are, which is one of the most thuggish, violent, narcotics cartels that's ever existed."

Richard Sullivan, then a senior AUSA and currently a judge of the U.S. District Court for the Southern District of New York, says what Barofsky was able to accomplish with the FARC prosecution was a show of dedication for the ages. "Main Justice had spent years trying to develop a case," he recalls. "And we only got involved because agents and law enforcement in Colombia asked us to step in and make some headway. Keep in mind, if we were going to seek to extradite, we needed the strongest possible case. We couldn't afford to swing and miss if the evidence fell apart. But Neil was able to accomplish in a couple of months what it had taken several years for people in Washington to not accomplish. It's a great example of how he was—and is—willing to push people if they got in the way of what he thought was the right result."

Over several months in the lead-up to the case, Barofsky and his partner Eric Snyder '94 spent weeks at a time in Colombia, unearthing evidence that everyone knew was out there but that had yet to be put together into a coherent whole. A big part of the plan: trying to lure FARC defectors identified through a Colombian witness protection program called Reinserado to come to the other side and testify about the organization's crimes. One of the most promising witnesses was a high-ranking female who had corroborated a number of pieces of information and who had access to FARC's senior leadership. She was so promising, in fact, that the U.S. team had identified her as one of the small number of cooperating witnesses to whom they would offer entry into the U.S. witness protection program in return for crucial testimony. It was a fortuitous decision.



She revealed a plan to kidnap Barofsky at an upcoming interview, torture him for information, and likely kill him. "That was it," says Barofsky. "I didn't go back to Colombia after that."

Presented with this new future, the witness came clean and explained that she'd been operating as a double agent, telling her FARC bosses what she'd been asked by Barofsky and how she'd replied. More importantly, she revealed a plan to kidnap Barofsky at an upcoming interview, torture him for information, and likely kill him. (The original plan had called for the woman to detonate a bomb during her interview, but she'd refused.) "It would have been a great 'get' for the FARC to grab a U.S. prosecutor," says Barofsky, somehow managing to consider the strategic implications before the personal ones. "But that was it; I didn't go back after that. I'm not that brave."

It didn't matter; the work was done. On March 2, 2006, Attorney General Alberto Gonzales announced a one-count indictment charging 50 leaders of FARC with importing \$25 billion of cocaine into the United States. The press release announcing the indictment mentioned contributions from the Department of Justice, the DEA, U.S. Immigration, the IRS, the FBI, the NYPD, the New York State Police, and the U.S. Marshals Service, as well as Colombian law enforcement. But Barofsky was the glue that held the case together.

Former U.S. Attorney Michael Garcia says Barofsky's work on the FARC investigation firmly ensconces him in the SDNY's lofty tradition of spearheading innovative federal litigation. "There are lots of great lawyers in the Southern District, so it takes a lot to

stand out," he says. "The way to do that is to be one of those people who can actually *create* a new case, a new enforcement initiative, or a new legal approach. That's a rare quality, but Neil showed he had it when he pretty much created the FARC case. Those are the people who move the office. Those are the people who can conduct great trials. That puts Neil in a very select group."

Barofsky's main souvenir from the FARC days is an eight-inch bayonet knife given to him by local law enforcement with an

also praised Barofsky's performance. "It was a complicated white-collar criminal case involving very complicated transactions," he recalls. "He mastered those transactions and presented them to the jury in a very clear and understandable way. Everybody talks about all the glory of trial lawyers, but you're putting in 10 hours out of court for every hour in. And it's clear that Neil is getting his hands dirty outside the courtroom."

"The experience of being a trial lawyer combines the best and

the worst of the job," says Barofsky. "As a prosecutor, it's like an elaborate game of chess. Your work literally starts months before the first pretrial motion, and everything is designed six months or a year out for what's going to happen in that courtroom. There's nothing quite as gratifying as laying down a strategy—anticipating a certain defense, for example—and seeing it come into play a year later. At the same time, there's the responsibility of it all. You can't be wrong; you can't be 99 percent sure that some person *probably* committed a crime. You might still get a conviction, but you still have to look at yourself in the mirror every morning. That's a heavy burden."

In October 2007, Barofsky was part of an SDNY team that won the John Marshall Award for Asset Forfeiture from the Department of Justice as a result of the Refco trial. Just over a year later, the DOJ again recognized the Refco team, giving it the 2008 Director's Award for Superior Performance by a Litigative Team. That was just a few months after Bennett and Grant were sentenced to 16 and 10 years, respectively, for their roles in the fraud.

Barofsky thinks both were adequate sentences, but he does agree with the perception that the lack of a sufficient threat of jail time is a major contributor to the preponderance of securities fraud in the U.S. "I'm in the minority in being pro-sentencing guidelines," he says, "and I do think the fact that they have been basically abrogated by the Supreme Court has meant that a lot of these white collar criminals don't get the sentences they deserve. I'll tell you what another problem is, though: Most people don't get caught. It's usually only during a financial crisis that a lot of these crimes get detected. It's much harder to detect fraud when everything is going well."

Speaking of going well, Barofsky was also thriving in his personal life at the time. He'd met a psychologist named Karen through an online dating service in March 2007, and was planning to ask her to marry him once the Refco case had wrapped up. On April 17, 2008, the decision came back on Tone Grant. While his trial partner was typing up the press release, Barofsky slipped out and picked up the ring. Like many a man with a ring in his pocket, he found it nearly impossible to concentrate on the celebratory drinks that evening, and at seven o'clock the next morning he asked Karen to marry him. Her verdict marked the second victory for Barofsky in as many days.

The couple planned to get married in Costa Rica in early 2009. It should come as no surprise, however, that the legally minded Barofsky wanted a U.S.-sanctioned marriage, and the couple decided to tie the knot stateside. Judge Richard Sullivan—Neil's SDNY mentor—married the two on 8/8/08, a date chosen for the Asian superstition that eight is a lucky number. (Even lawyers can be superstitious.) They told no one of the secret nuptials.



"Neil likes to say that I gave him the 'God and country' speech, and I did. I told him that it was a call to service at a historic moment, that the country needed the right person, and that he was that person."

*Former U.S. Attorney Michael Garcia*

inscription of one operational code name: "Bogotá 2007: Tango Chaser." It is not, contrary to some published reports, the *actual* knife taken from a would-be assassin of Barofsky. Still, it's a damn cool piece of office décor.

WHETHER HE'LL ADMIT IT OR NOT, Barofsky realized that narcotics wasn't going to get any better than the FARC case, and in 2005 he transferred to the Securities and Commodities Fraud Unit.

It didn't take long for him to end up at the center of another important case—the prosecution of several executives of the brokerage firm Refco for perpetrating a \$2.4 billion accounting fraud. Along with colleague Chris Garcia, he deciphered an unusually complicated scheme in which Refco's former CEO Phillip Bennett and one of its owners, Tone Grant, had, over a period of several years, masked hundreds of millions of dollars of losses through a series of sham transactions.

If Barofsky was already known for his dogged investigations and ability to work well both with internal teams and other law enforcement agencies, it was during the Refco trial that his courtroom abilities became widely appreciated. "He is a tremendous trial lawyer," says Barkow. "He delivers his jury addresses, opening, closing, and rebuttal without a scrap of notes, which is very rare, particularly in complicated cases. His rebuttal in the prosecution of Tone Grant was probably the best one I have ever seen by a prosecutor."

The compliments also come from the other side of the courtroom. Gary Naftalis, who represented Bennett in the Refco proceedings,



UNITED STATES ATTORNEY GARCIA had seen enough of Barofsky's tenacity and judgment to trust him with important cases. But in working with him on the Refco case, he also saw leadership traits. Turnover at the senior level in the Southern District doesn't happen on a regular schedule, however, and while Garcia—now a partner at Kirkland & Ellis—had his eye on Barofsky for a senior position, none opened up.

A solution presented itself, however: in mid-2008, Garcia decided that mortgage fraud had become pernicious and pervasive enough that it was time to create a new mortgage-focused investigative group. He asked Barofsky to be in charge of it. "Neil took our ability to go after mortgage fraud to a whole new level, pretty much from a standing start," recalls Garcia.

The group wouldn't enjoy the fruits of Barofsky's leadership for long, though. Just months after creating the group, Garcia received a call from the White House. The administration was looking to fill a new position as chief watchdog of the TARP, which would soon be disbursing money to banks at a disturbingly fast clip.

Did Garcia have anyone in mind, the White House wanted to know? Yes, in fact, he did. "The person I thought of immediately was Neil," says Garcia. "Because it's a really difficult role requiring a combination of attributes: good judgment, the ability to work with folks, but also the ability to push back. And while we know in hindsight some of the dimensions of the crisis, at the time we didn't really know how things were going to break in terms of a possible meltdown in the markets."

Taking the idea to Barofsky, Garcia decided to go with the hard sell. "Neil likes to say that I gave him the 'God and country' speech, and I did. I told him that it was a call to service at a historic moment. I told him that the country needed the right person in the role, and that I thought that *he* was that person. On a smaller scale, I'd seen him create an organization from scratch with the mortgage fraud group. I told him he had a chance to do it again, but this time on a humongous scale—to be the only watchdog, the only check on spending of hundreds of billions of dollars. Needless to say, he bit."

Things proceeded quickly from there. Bush nominated Barofsky on November 14, and the Senate confirmed him on December 8. One glitch: During the confirmation hearings, Barofsky referred to his "wife," Karen. One of his sisters, watching in Miami, turned to his mother and said, "What did he just say?" Numerous theories sprang up regarding Barofsky's apparent slip of the tongue, all of which would be cleared up at their "official" wedding. The two would postpone their African honeymoon until May 2009.

A reporter for the New York *Daily News* tracked down Barofsky's father for comment. "You should congratulate the country," Barofsky the elder said. "He does his homework and his prosecutions speak for themselves. [But] I don't envy him. It's not going to be an easy thing."

BAROFSKY ROLLED INTO WASHINGTON with a full head of steam, if not an actual office or employees to speak of. For the first several months, he barely saw his new wife, working from dawn until dusk trying to build a government agency from the ground up. Fifteen months later, he has succeeded in that goal, and his creation has been successful both in terms of its objectives and in terms of public relations measures. When Barofsky talks, Congress, the media,

and the American people listen. "I sometimes chuckle when I think about it," says Sullivan. "He was tailor-made for the job: so independent, so smart, so hardworking. The taxpayer is getting their money's worth."

That's not to say that he hasn't ruffled a few feathers along the way. When Barofsky is taking people to task, he rarely aims low. He has on several occasions lambasted Hank Paulson for misleading the American people about the health of certain banks—Bank of America and Citigroup come to mind—during the early days of the financial crisis, when Paulson claimed that *every* bank receiving the TARP's initial disbursement of \$125 billion was healthy.



**TARP DEFENSE INITIATIVE** *Lori Hayman, legislative director; Deborah Mason, chief human capital officer; Barofsky; and Chris Sharpley, deputy special inspector general, at a weekly SIGTARP senior staff meeting.*

Both banks would require subsequent infusions of billions more to stave off collapse. The result of that disconnect, Barofsky says, is a level of cynicism among the public that could have been avoided. "He knew in his heart that they weren't healthy," Barofsky says. "And in the process, he created a sense that you can't believe anything the government says."

Barofsky has also chided the current treasury secretary, Timothy Geithner, taking him to task over what he considered misleading statements about the ultimate return to taxpayers for the \$85 billion in government support of AIG. Over and over, he has criticized government officials for what he considers unnecessary and damaging obfuscation regarding the use of TARP funds, a position with which most major media organizations are in total agreement—thereby guaranteeing Barofsky a podium when he seeks it.

It's ill advised to respond to such attacks publicly when someone has the moral high ground on their side, so there's been nary a peep out of the Treasury Department regarding most of Barofsky's barbs. That doesn't mean that Treasury officials don't get up to their usual Washington antics. In early 2010, a whisper campaign was apparently emanating from senior Treasury officials suggesting that Barofsky was planning to switch parties and run for state attorney general of New York as a Republican, thus explaining his attacks on Obama's choice of Treasury Secretary. But such a theory

ignores the patently obvious fact that Barofsky is and always has been bipartisan in his choice of critical targets.

Indeed, Barofsky understands that his job is not to make or to implement policy, but merely to keep an eye on those doing so with billions of dollars of taxpayer money. Still, he also understands the context of it all. “We talk about the costs of the TARP,” he told the NYU Law audience last November. “We can talk a lot about dollars and cents. And we can talk about the need for regulatory reform. . . . But there is a third cost: to the credibility of the government itself, which is one of its most important and necessary assets in dealing with a crisis. People need to trust their government. They need to be able to have faith when asked to come up with hundreds of billions of dollars. And the failures of transparency have had a dramatic impact.”



**POWER OF ATTORNEY** *Preet Bharara, U.S. attorney for the Southern District of New York, listens as Barofsky announces SIGTARP's first-ever indictment—fraud and embezzlement charges against Charles Antonucci Sr., former president of the Park Avenue Bank in New York, in March.*

Interestingly, Barofsky comes across as more critical of disseminating public officials than of Wall Street itself. Indeed, he thinks bankers are doing as bankers are wont to do, and that if there's any real tragedy from the crisis, it's that policymakers may yet squander a perfectly good opportunity for meaningful financial reform. “It's interesting to hear so many people say, ‘Wow, rather than accomplish our policy and societal goals, Goldman Sachs and these banks are using all this money to maximize their profit,’” says Barofsky. “What do you think happens in a capitalist society? What are these banks supposed to do? They are going to do what they do, which is to try to make profit. If you are going to push this amount of money out and not put any conditions on it, it just seems strange to me to be shocked and horrified by what is a very predictable result.”

BAROFSKY IS MORE OF A DOER than a talker, though, and those who know him best think the real action at SIGTARP is yet to come. He's an investigator at heart, after all, and he promises that some of those 105 open investigations could be quite significant. The Bank of America charges were just the beginning.

“Unfortunately, history teaches us that an outlay of so much money in such a short period of time will inevitably draw those seeking to profit criminally,” he testified to Congress in February 2009. “One need not look further than the recent outlay for hurricane relief, Iraq reconstruction, or the not-so-distant efforts of the RTC [Resolution Trust Corporation] as important lessons.” A year later, he made clear what he considers the likelihood of uncovering fraudulent use of TARP funds: “The only government program that has zero chance of fraud or misconduct is a program that never gets run.”

Once again, he's thinking like the other side: “Put yourself in a corporate fraudster's mind. The \$700 billion bailout of Wall Street was not only a financial bailout but also a potential fraud bailout. Anyone in the midst of perpetrating a fraud is always looking for the big cash out, the infusion that's going to save you and get you out of the situation you've found yourself in. So let me be clear: If you think TARP money is going to be your way out, you've got another thing coming. And we're not going to stop at banks that *got* TARP money. We're going to be looking at those who merely *applied* for TARP money.”

He wasn't kidding. On March 15, 2010, Charles Antonucci Sr., the former chief executive of Park Avenue Bank in New York, was charged with trying to steal from the TARP by cooking the bank's books—the first time criminal charges had been brought in connection with an attempt to steal from the program. It's a point worth repeating: Park Avenue Bank *never even received* TARP funds. That didn't matter; they tried to get their hands on some, and that put them in the SIGTARP's sights. His accompanying statement on the day of the arrest was pure, no-frills Barofsky: “If you attempt to profit criminally from this historic program. . . you will be charged, and you will be brought to justice.”

Barofsky knows that his is a temporary job, even if it lasts another five years or so. At some point, after all, the TARP will be wound down, and there will be no more money left to track. What then? If it was hard to see him settling into a well-paying partner's gig a few years ago, it's even harder now. A civic-minded lawyer from the very beginning, Barofsky's gotten a taste of what it's like to make a difference on the biggest stage possible, one populated with actors like the president of the United States, the Congress, and the most powerful corporate interests in the country. New York attorney general might not be too far off the mark.

Before he dives headlong into the next gig, however, he and his wife are likely to step back and appreciate their most significant accomplishment yet: the birth of the couple's first child—Zoe Ella—in April. Pointing to a picture of Karen scuba diving off Lombok, Indonesia, Barofsky sheepishly admits that he brought the underwater photo into the office when he realized that the only person he had a picture of was the Yankees' Mattingly. And while he has spent a career doing things a little differently than those around him, it's a good bet Barofsky will soon be acting like a typical new father. Which means Mattingly better get ready to share a shelf with pictures of a little girl. □

*Duff McDonald is a contributing editor at Fortune and New York magazines. He is also the author of Last Man Standing: The Ascent of Jamie Dimon and JPMorgan Chase (2009).*





**{ THE BLIND MEN AND THE ELEPHANT: A PARABLE }**

*Once upon a time, an elephant came to a village. Having no idea what an elephant was, six blind men decided to "see" it by touch. "Hey, the elephant is a pillar," said the man who touched his leg. "No, it is a rope," said the man by the tail. "It is a thick tree branch," said the man by the trunk. "A big fan," said the man by the ear. "A wall," said the man by the belly. "A pipe," said the man by the tusk.*

*A wise man heard the ensuing argument. He explained: "All of you are right. Each of you is 'seeing' a different thing because you are all touching different parts of the elephant."*



# THE SHAPE OF GLOBAL GOVERNANCE

As the world gets smaller, regulation increasingly takes form beyond the state level through international bodies such as the United Nations, World Trade Organization, and European Union. Last spring, the Law School magazine invited a dozen leading international legal scholars, political scientists, and philosophers, all of whom are on the NYU Law faculty or were inaugural visiting fellows of the Straus Institute for the Advanced Study of Law & Justice, to make sense of this new order. They discussed how to define global governance, how rule of law factors in, how to measure success, and, at its most basic, what to call the whole system. José Alvarez, Herbert and Rose Rubin Professor of International Law, agreed to moderate the deep and provocative discussion that ensued. An edited and condensed version follows.

**JOSÉ ALVAREZ:** Many of us look at different institutions, formal and informal, from a variety of perspectives, including political science, anthropology, and law. We use different terminology to describe what global governance is. Some of us see “global administrative law,” some describe “regime complexes,” others the “constitutionalization” of the world or the spread of “the rule of law,” “judicial empowerment,” or “judicialization.”

Are these different parts of the elephant? Does the label we choose influence how we see that elephant? Are the labels important?

**JAN KLABBERS, Professor of International Organizations Law, Helsinki University:** There is definitely something more going on than just describing different parts of the elephant. A label such as constitutionalization carries with it a sense of legitimacy, a sense of rights protection, which would not be as evident if you describe things as a regime complex, or as legalization or judicialization. The label would definitely indicate a certain way one would normatively think we might be heading, or ought to be heading.

**ALVAREZ:** So part of it is prescriptive.

**GIANLUIGI PALOMBELLA, Professor of Legal Philosophy and Sociology of Law, University of Parma:** There is an epistemic value and pragmatic consequences behind description.

Global administrative law (GAL), for example, as a paradigm of global governance, rejects substantive organizing constructions but enhances the legal side: It does see a transborder reconnection structure of law. This is a very effective view that aims at managing global governance in a certain way.

While global governance works through the double move of narrowing to specialized areas and extending control over the globe, the legal account tends to configure a new overarching

legality (like GAL), equating it with a homogenizing global law. These theoretical frames have pragmatic consequences.

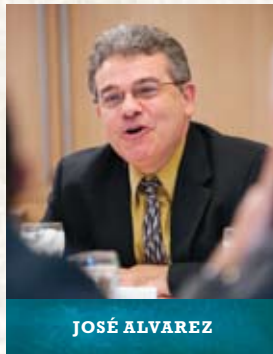
**ALVAREZ:** So there’s description, prescription, differing specializations, and perhaps methods to exert control in our labels. So that when we say we’re “governing the world,” that in itself suggests what we aspire to accomplish?

**ANDREW HURRELL, Montague Burton Professor of International Relations and Fellow, Balliol College, Oxford University:** In a sense, all labels are arbitrary. What’s important is the way in which whatever label we use actually connects with the different parts of the elephant. After all, there is an elephant, and it’s large, lumbering, and dangerous. And people and societies get affected, often negatively, by that elephant that we call global governance.

One of the very powerful ways that many people have tried to capture the idea of global governance, particularly in the 1990s, was to adopt a rather narrow

view, to see it essentially in terms of finding effective, efficient solutions to a set of well-understood, shared global problems. But the risk is that this displaces two other crucial issues.

One is the issue of values: Whose values are being included in the solutions to these apparently shared problems? And the other is power: How are these different clusters of regimes, rules, and institutions connected to power structures? This problem is particularly evident in periods when power is shifting and changing, because any legal regulatory administrative structure has to be connected to the realities of how power is changing and has to be compatible with the interests and values of the powerful states that are emerging in the system. And we are living through a period where power is shifting—away from the established core of the old G-7 and toward a new group of emerging regional and global powers.



JOSÉ ALVAREZ



**ALVAREZ:** So our labels partly describe reality and are partly aspirational—“if you build it, they will come”—and it will reflect reality.

**ROBERT KEOHANE, Professor of International Affairs, Princeton University:** Let's go back to the first question: Why do we have so many labels for global governance? I come to this as a political scientist. Basically what it comes down to is that this is a highly variable phenomenon. It's not one elephant; it's a herd of elephants.

One way to think about this descriptively is to think about dimensions along which global governance varies. I want to mention three: 1. Legalization. Some local governance takes place with informal practices that are not legalized. Others take place with a very legalized structure—WTO, for example—with dispute settlement arrangements, opinions that are argued out and published. 2. Comprehensiveness. The attempt of the UNFCCC, the framework convention on climate change, to have a comprehensive climate regime, in my view, has failed, and we're seeing a very different, less comprehensive regime, a set of specific regimes. And, 3. How integrated or fragmented the pattern is. If we mapped out the local governance, we'd find lots of examples on all three of these dimensions. It becomes hard to generalize until we have a clear notion of what we're talking about. For example, the WTO is as close as we get to a legalized, comprehensive regime. The migration regime is an example of a nonlegalized, informal, fragmented regime.



JOSEPH WEILER

**JOSEPH WEILER, University Professor and Director, Straus Institute for the Advanced Study of Law & Justice, NYU School of Law:** I would bet that you can open any book on the law of the WTO and the word “governance” would not be in it. So if you look at your standard international law book, you will still find it working within the paradigm that international law is a way that states negotiate, try to vindicate their national interest and rules to contain their national interest,

or to harmonize with the national interest of others.

Even the most progressive communitarian view of international law would still privilege (a) states and (b) this notion of sovereign equals with different volitions trying to make the world a better place. Using a vocabulary of governance much better describes what's happening in the international arena.

Before, the main normative sensitivity was consent or nonconsent by states. Now there's a much broader set of both efficiency questions and normative questions of legitimacy. In the former, for instance, where governance exists, we will want efficient governance for the management of resources and also the achievement of objectives.

There's a huge payoff if you go to any doctrinal area of international law, whether it's state responsibility, the use of force, international, environmental, or the law of the sea, and look at it through the spectacle of global governance. Is there global governance here? How does it affect global governance? Global governance is a sensibility employed like a prism. It's a coloring agent that suddenly illuminates phenomena that, under the normal spectacle of international law, you didn't see.

**RICHARD STEWART, University Professor and Chair and Faculty Director, Hauser Global Law School Program, NYU School of Law:** The sensibility of governance frees us from the distorted perspectives of traditional legal categories. But then we have to reconstruct the field, because governance is such an amorphous set of phenomena. Reconstruction is necessary to understand it and set at least an implicit normative agenda.



KEVIN DAVIS

And then the question is, Do each of us just retool his or her own particular discipline? Or are there other crosscutting pathways conceptually and normatively?

**KEVIN DAVIS, Beller Family Professor of Business Law, NYU School of Law:** I want to resist the implication that there's been this evolutionary progress. The concept of governance misses certain aspects of the phenomenon that are of particular interest to me—typically, the ones

that involve more decentralized forms of cooperation.

When I think of governance, I think of the relationship between the governors and the governed. It's difficult for me to fit in things like private contracting, like the terms of credit default swaps on sovereign debt and their impact on behavior, into the concept of governance. That activity is not necessarily being dictated by any sort of governing authority. It is a form of normativity that is structuring international activity, international capital flows, and so forth, and I am not sure that using the term “governance” or a governance lens, is going to allow us to analyze that particular phenomenon in all its different facets. I caution against the idea that now that we've discovered the role of governance in international affairs, we've arrived at the sort of intellectual nirvana where this is the best model, because it's not necessarily so obvious to me.

**SALLY MERRY, Professor of Anthropology, Law and Society, New York University:** I've always found it interesting to look at how international law works in practice—the kinds of social relationships, networks, and sets of understanding that shape international law in process. The term “governance” moves us in that direction. But it's also important to recognize that there are social relationships, informal organizations, networks of people that are now transnational that do a lot of the work of actually making international law activities relevant to populations and countries.

There are important dimensions of shared cultural understandings that exist in a variety of the institutions of cosmopolitan consciousness. What we see emerging are various populations that think of themselves in more or less cosmopolitan ways. Certainly in the field of human rights, human rights compliance is going to depend on average people who think of themselves in terms of possessing human rights, which means in some sense they think of themselves as global citizens. How those social/cultural changes happen is enormously important for thinking about how international law works.

It's a dimension—if we shift from law to governance—that we need to keep in place, both the social networks and the cultural dimensions of what this might mean and how it goes about reshaping the world.

**ALVAREZ:** Does the WTO create this consciousness? Or is it the other way around?

**MERRY:** It goes both ways. As the consciousness emerges, it feeds into these institutions, which otherwise are fairly irrelevant to the local population, and the institutions themselves begin to shape what are essentially local normative orders that may be law or law lite. We live in a world of plural legal systems; some are international or domestic, and some are very informal social-group based. Each one shapes the other in a somewhat semiautonomous way. But they're very unequal in power. This is an important dimension of them.

Looking at the complexity of these different regulatory structures and how they shape each other is really essential to understanding how this international law system works as a social system.



**ALVAREZ:** Does anybody other than Joseph think there's something to the progress narrative that international lawyers talk about? The suggestion is that international law and governance are better for the world. This is at the heart of constitutional talk, rule of law talk, judicialization talk....

**WEILER:** Wait a minute—I never put any normative value on it. The only progress was an epistemic progress, to realize that it's not that we once were in the Wood Age, and then the Copper Age, the Bronze Age, and then the Steel Age, but that these things coexist.

So in terms of legal norms, international law simultaneously has to be understood as having some constitutional, legislative, and administrative norms. Also governance norms. If we don't use that concept in trying to explain the complexity which is the international legal system, we are missing out on something very important.

**KEOHANE:** The progress issue would be a whole discussion in itself. I want to point to two changes in the last 20 years that I certainly didn't expect. The common wisdom in political science in the 1980s was that GATT was not legalized, and that was because of the structure of power and the nature of the interest involved. It was quite a surprise when WTO was as legalized as it was.

The other change is the development of a shared understanding that governance and government are different. Governance, as it's used by political scientists, does not imply the kind of hierarchy that government implies. That distinction is important because you don't have a lot of hierarchy in world politics. You have a lot of reciprocal relationships, a lot of activity by nonstate actors; you have the kind of contracting you talk about.

**PALOMBELLA:** The question of governance has different layers itself. But the problem now has shifted from government vis-à-vis governance to legality vis-à-vis governance. We do not even dare to have a global government, but we try to develop "legality." Now, as a connected issue, the aspiration to legally "cover" or tame global governance somehow might overlook the persistent multiplicity, diversity in shapes and social embeddedness of different orders, and legalities that overlap and compete on the surface of the globe. As Professor Merry said, we have many layers with very different *raisons d'être*. Their inevitable connection should not be taken as

testament of legality as one-dimensional (if we have global administrative law, we also have inter gentes/interstates law, national law, transnational "merchant" law, regional law like the E.U., and so forth). Still, it is relevant that the legal dimension can prove to be promising in facing such complexity.

Medievalism is a "false friend," but still we can learn something from it: The medieval environment was not controlled politically but



**GIANLUIGI PALOMBELLA**

through law, by diffusion of legalities, by legal science, development of legal scholarship. It was the only way to keep all the layers together. We are close to such a step in global governance.

**BENEDICT KINGSBURY, Murry and Ida Becker Professor of Law and Director, Institute for International Law and Justice, NYU School of Law:** The idea of global governance can become hopelessly broad. One way for lawyers to tighten the concept to get some analytical purchase is to focus specifically on regulation, or regulatory governance.

Global regulatory governance is, of course, highly political. It aims to affect conduct, including private conduct, and an ever-increasing volume of human interactions on important questions

that people care strongly about. It has substantial effects on the distribution of resources. So the moral and normative stakes in global regulatory governance can be high. That applies to governance by both formal and very informal institutions.

In our view, this political enterprise also has important legal dimensions. The NYU Global Administrative Law Project focuses principally on situations where regulatory power is being exercised beyond the state, whether by states or intergovernmental organizations or partially or wholly private actors. Not all of the regulation we study is explicit. Behavior might be regulatory in the sense that there's an absence of regulation there deliberately, to serve the interests of some particular groups, or perhaps with the normative aim of letting people flourish free of formal regulation.

Regulatory power in transnational governance is often wielded by a complex combination of actors addressing a myriad of different activities, and without a single directing mind. The interplay among regulatory actors and activities often does not correspond to any single act of will. There are sometimes irrationalities, arbitrage opportunities, curious gaps, etc. But we can still think of those situations as regulation.

In all of these regulatory situations, we must start to think: How should that power be structured? What should be its principles of transparency? Who should be participating there? Should there be accountability? Should there be review? Could or should the structure be set up more hierarchically?

The legal global governance perspective brings at least two important features that have been missing from more traditional international law approaches. First: the dynamic effects of regulation. Rather than somebody primarily asking, "Well, what is the law? How does it work? What is the function of this institution?" we urge that scholars, and our students, also ask: "What are the incentives on all the actors? How do players reposition? How do they start to think differently? How does it reconfigure power around those things? How does it reconfigure normative expectations and the language in which an issue is debated in terms of justice?" Second: attention on the effort of regulation to motivate private actors. Legally grounded regulation is not simply a matter of the structure or formal international regulatory power and its application to states; it aims also to incentivize action by a lot of other players. There are thus likely to be unexpected shifts of behavior, leading to further regulatory actions or problems. There are also likely to be counteractions: counter-power mobilized against whatever precise regulation is taking place, by those who contest it.

**STEWART:** Gianluigi asked how can we bring law to global governance? Rather than elaborating the structure of law within a relatively closed institutional system, globally we face a much more open universe of communication, including normative interaction. It is very plastic.

How does law catch up with globalization? And should it try to? How far should global governance be "legalized"? Global administrative law does not aspire to provide a comprehensive answer to the questions of law's role in global governance. We focus on the procedures and mechanisms for review of global regulatory administrative decision making. We are witnessing the rapid growth of global regulation, as Benedict has articulated, and we see that much of that regulation is administrative in character. Accordingly,



**BENEDICT KINGSBURY**



we ask questions about the role of administrative law mechanisms in promoting accountability and responsiveness by the global administrative decision makers.

We are aware of the drawbacks of this focus. If you don't look at all the systemic effects and have more inclusive goals, maybe you're not making progress. Our strategy is to examine the role of



SALLY MERRY

some elements of law as applied to critical subsets of the global governance phenomenon.

**MERRY:** There are multiple ways that law can be brought into focus as part of governance, which doesn't involve just asking about whether it's compliant.

With law, it could be seen as standard setting, as producing cultural shifts, as a political resource. If we look at human rights, the enforcement mechanisms are relatively

weak, and yet there are ways that those laws are actually culturally important in terms of determining standards by which people judge behavior. They gather resources, and they provide political mobilization strategies for actors in various places.

**ALVAREZ:** Beth, how does compliance play into this question of whether governance exists or not?

**SIMMONS:** One of the most fruitful ways to answer is to think about the way that international standards and norms strike a chord in domestic conversations. And, how they further the interests of certain groups and start to help them see themselves in different ways.

The extent to which the international legal norms and international laws become very useful in domestic conversations and contestations, and create a power resource in many cases, is an area in which power for some of these groups is very hard to come by. And it's just about the only thing that they have to try to grasp.

One of the very interesting questions is the way in which international norms diffuse to the domestic level, whether that is by persuasion, by group activation, or by changing the incentives. For example, whether litigation, or the fear of litigation, transnationally can create incentives to look over domestic processes, to handle investment disputes.

**KINGSBURY:** Can you say something about your empirical work on human rights in this area?

**SIMMONS:** I did some quantitative and qualitative work. I found that when states read international treaties, there are actually three kinds of consequences. One is that it can change domestic agendas. So issues that might not have even been on the table in certain countries, by virtue of their exogenous introduction from the outside, get introduced. The second is that in domestic contexts, international treaties when they're ratified, and under certain circumstances, can be used as very specific legal resources in actual litigation. That has helped to feed into the third mechanism: social mobilization. There's a very strong relationship between those two things, where litigation can support and stimulate social mobilization and social groups, very consciously, when it seems like the right strategy in a particular cultural context, decide that litigation would actually strengthen their mobilization efforts.

What I find is that when states ratify agreements, these consequences in the aggregate lead to changes in some indicators we might care about with respect to human rights.

**DAVID KRETZMER, Professor Emeritus of International Law, Hebrew University:** How do human rights fit into this whole notion of global governance? You have to distinguish three issues. First,

take the institutions, created by treaties between states, that are operating on the international level, such as the Human Rights Committee: What are the rules that apply to them? How are they supposed to act in new situations?

Next, what is the place of human rights in the actions of global actors that are not ostensibly connected with human rights—the WTO, E.U., and IMF? What human rights constraints apply to them? The third issue is the general way that we perceive human rights. We are trying to have an influence on state compliance with norms that have been laid down internationally, and the whole mechanism here is geared toward closing the deficiency gap between the international norms and the way states act in actual practice.

The questions that Sally Merry and Beth Simmons have asked are the most fundamental questions because lawyers have often made the simplistic assumption that if you only have these norms, everything is going to change and people are going to comply. The relationship is much more complex. How does this monitoring function, and can it really contribute to promoting compliance? Look at the tremendous changes that have taken place in the very perception of the HRC, of its role over the years, perceiving its role originally as part of friendly relations between states, which implies that we must not rock the boat too much and not criticize each other.

**ALVAREZ:** Do you have a tentative working hypothesis about how or why this mission creep with the human rights committees happened? Is it just the product of bureaucratization, or is it due to pressure from social movements?

**KRETZMER:** In the human rights field, treaties are a mechanism for lawmaking and not for regulating the relations or the interests of states. States may have some kind of concern about whether other states comply with their obligations. However, persons in one country are generally not going to be affected if the government of another country violates its obligations or the rights of its citizens.

When discussing how to monitor compliance with human rights treaties, there was a debate. Are we going to have monitoring by political bodies? Or are we going to have some kind of professional monitoring? The states opted in this case for a professional monitoring body. But at the time of the Cold War, you could have independent professional monitoring by people who were elected from the non-communist countries. There was no such thing when HRC members came from the communist countries; they were all political nominees of the state parties involved, and in the HRC they were plugging the interests of their states.



DAVID KRETZMER

This eventually broke down when the Cold War ended. But the HRC was left with some of the rhetoric that had been adopted during the Cold War, like the notion of constructive dialogue, which reflected the idea that the object of the monitoring process was to promote friendly relations amongst nations. The HRC continued using the rhetoric of constructive dialogue without ever having considered what the term meant once the Cold War was over and its constraints on the committee's work were removed.

**KEOHANE:** If there has been progress in the last 20 years, it's been intellectual progress in the convergence between political science and law. When I was in graduate school a very long time ago, there were two sides of this issue. Many political scientists scorned international law, because of the ridiculous claims that were sometimes made.





ROBERT KEOHANE

To use the phrase by Andrew Jackson at the Battle of New Orleans, international lawyers have lowered their sights and achieved much. You're doing global administrative law, which is very different from saying that world peace comes through world law. So the claims have come down to a point where they're much more reasonable.

And second, we political scientists find ourselves like Molière's bourgeois gentleman who's speak-

ing prose without knowing it, and I've been told this for 25 years. We talk about accountability and about diffuse reciprocity. So we are speaking in terms familiar to legal scholars while using different terms. And so it seems to me that this convergence came partly because the world changed; we see much more legalization. And it helped that international legal scholars lowered their sights a little bit and became more realistic politically.

**WEILER:** There is a payoff when we think of governance as part of political science, of social science, explaining why things happen in the way they do. What are the incentives? What are the disincentives? But there's also a payoff in terms of political theory. One of the blind spots of law in general, and international and constitutional law in particular, is a certain fixation on rights.

And one of the most important developments in international law in the last half-century is this tremendous interest, both in theory and in practice, in instruments that protect rights. So there are multiple instruments and they protect multiple rights in different regimes, and the mechanisms for protection, and the monitoring have increased. A good world is a world where everybody's rights are effectively protected.

But obscured is the fact that despite all this development and progress, individuals are still treated as objects. In the political theory of the state, the individual is very much a subject. He determines the outcome of elections. There is a very different understanding of the role of the individual in international law. So the first payoff of a governance perspective is that it draws upon certain aspects of political theory that highlight a different view of the individual, not simply as a recipient of rights, the way I protect my children, but as subjects entitled to powers. This perspective encourages us to see the power deficiencies of individuals. The lens of global administrative law highlights this phenomenon because the stakeholders of international legal governance grow both wider and deeper, and yet the individual is often not more than an object.

And the second payoff of a governance perspective is that it allows us to think: In what ways can the individual be empowered rather than be granted rights? Because once again, the notion of responsibility in international law is exclusively state responsibility. When there's a violation of the law, it is states that are held to account.

So in humanitarian law, in the field of use of force, there can be some individualized responsibility. Within the theory of the political state, from which governance is borrowed, in some ways individuals are responsible-ized. If you elect a certain president and a certain party, there will be consequences to that. And you will bear the material consequences, the political consequences, and you as individuals will also bear the moral consequences.

No point in complaining about, "The government took us to war"—you voted for the government; you even voted them into power. There's a much stronger notion that individuals are responsible for actions of the polity, in a way that is totally absent in international

law. In the use of force, we never differentiate between the state that went to war on the basis of democratic decision making and some dictator who took them to war. It's only the state that is held responsible, and if there were crimes, we might individualize the responsibility.

But the actions of the individuals within a state are never responsible-ized. In some deep way, we don't take democracy seriously in our thinking about international law. And governance sensitizes not only to the power gap in international legal discourse—it's all about rights and not about power—but also to the responsibility gaps, where responsibility is only attached to states and not to individuals who comprise those states.

That's a huge advance in our thinking. But it enriches not only our social science understanding of international law but also our theory of international law: what it is about, what it ought to be about, in discomforting ways.

**KLABBERS:** Part of the problem is a practical one: that international organizations by and large refuse to cooperate. They refuse to give access to their standard practice of solving responsibility problems, etc. So all those people who have been rapporteurs for the International Law Association or the International Law Commission have found the doors closed in their faces.

The deeper problem may well be that no matter what sort of deontological regime you create, whether it's constitutionalization or global administrative law, whether you call it responsibility or accountability, it'll always leave a few gaps, partly because rules never figure out their own application.

**HURRELL:** The conversation between political theory, political science, and international law is important here. It has been slow in developing, but this is now changing. Political theorists have often tended to focus rather narrowly on human rights and economic distribution, rather than on the politics of global governance. A lot of the normative discourse has been somewhat disconnected from the actual practices and embedded practices of global governance. The triangular conversation among political theory, explanatory political science, and international law is one of the areas that has been gathering pace as a conversation.

**WEILER:** In developing the political theory of global governance, there might be some places where the global administrative law movement is ahead of political science, because they're thinking seriously about these kinds of normative evaluations.

**KEOHANE:** We political scientists are still talking about accountability and legitimacy. And you're providing some much more specific metrics and standards and procedures, which constitute and flesh out what it means to be accountable, and which might be the basis for legitimacy. You're proceeding in a kind of parallel track along the same direction, but you're getting more specific.

**ALVAREZ:** How do we criticize these institutions for what they do, and why?

**MERRY:** Actually, Kevin and Benedict and I have been working for a while on thinking about what role the construction of indicators as a form of knowledge has in processes of global governance. And as we look around at global governance decisions, they increasingly rely on these systems of numerical representations, often of countries—human rights violations, social economic factors—that produce rankings that provide a kind of simplified knowledge base, which producers recognize are a simplified knowledge base, but



JAN KLABBERS



on which decisions may be made and public opinion constructed. The questions really are about how these forms of knowledge are produced, what kinds of information are included and what are not included, and how this may be affecting the way we understand the world and specifically how global governance works.

My concern about this developing technology has to do with the kinds of knowledge that get included and the kinds that are by definition not included in the need to produce commensurable categories across a wide variety of social situations and contexts. Representing a country by a number is clearly difficult. There is kind of an inexorable move toward doing this, which came from phenomena that were more readily measured, in the sphere of economics, to other areas that are much more difficult to measure in the field of governance—like rule of law and human rights compliance efforts. Here, there are issues about where the data comes from, who's measuring it, and who's counting, as well as more complicated questions about how these specific pieces of data collected in particular contexts get put together and constructed as this simplified representation.

Now, despite my concerns about this process, the creation of numerical measures and ranks is both a mechanism of governance and also a fundamental mechanism of reform these days. So social

movements that are trying to produce reforms will also develop indicators. Another example is the U.N.'s Millennium Development Goals, which include indicators and are a way of raising awareness of the problem. Providing reports about "this many people are starving or in poverty" or "this many women are battered" offers a mode of reform. At the same time, it is also a mechanism for producing knowledge about populations to govern them.

So the use of indicators for governance has this duality to it.

As indicators become more central to global governance in both ways, it is important to ask how this information is produced, how the data is collected, how it is used, how it is understood, and whether it is really producing a new basis for global decision making. Despite my concerns about what indicators actually represent, I recognize that this is a mode of power in the contemporary global world, that we probably cannot do without them.

**ALVAREZ:** So your project with Kevin is not to get rid of them but to improve them?

**MERRY:** My goal is to have users be more skeptical about them. Producers are quite skeptical about them. They know the limitations and the compromises they have to make to represent them to the general public—all the cautions and the worries and the compromises and the inadequate data that produced them tend to disappear. In the media these indicators get represented as facts. It's the intersection between the indicators and the public and decision makers that is the area I am principally concerned with.

**DAVIS:** The first move for us is the conceptual one: simply to recognize these indicators as a form of, an exercise of, power. Recognizing that you don't only govern through legal instruments and administrative directives and so forth, but also by producing information, including in this quantitative form that we've labeled "indicators."

And then you can spin out the policy implications as well. Focusing on indicators gives us a new way of thinking about the role of law, for instance, in controlling the exercise of power, because once you've recognized that this is a technology of governance, you can start to think, Well, how should it be controlled? And in

thinking about how to control that exercise of power, you can apply a global administrative law or regulatory framework.

For example, there might be procedural controls that you can place on the producers of the indicators, encouraging them to be more transparent about the methods of construction, involving more participation, more accountability, or having review mechanisms to validate their data, and so forth.

Or you can think about substantive norms that might be applied, particular standards of reliability that indicators might satisfy. Or structural interventions where you try to encourage the production of competing indicators to prevent one producer from gaining too much power.

There could also be education of the decision makers who are actually using some sort of World Bank indicator, for example, to decide how to allocate aid across countries. You can say, "Well, there are concerns here that you may not be recognizing in your current practices." So there is definitely space for more policy-oriented interventions.

**PALOMBELLA:** Often it happens that "rule of law" is used as a device to protect internally, say, U.S. democracy against international law, and the like. But there is some other sense, for the rule of law "outside," that is, on the global governance dimension. On the globe, legalities can conflict and overlap like tectonic plates.

My hunch is that rule of law on this meta level deals with granting some equal standing between legalities, although of different extension and depth. Some kind of legal language develops through this meta rule of law in between legal orders. One can think, among many, of the European Court of Justice when contrasting Security Council resolutions by appealing to a rule of law that protects our fundamental rights and making clear that this should matter in the confrontations with other legal orders—international law included. There should be, and in part there is already, a kind of rule of law that contrasts asymmetries of power and fosters some communicative processes beyond pre-given, content-independent hierarchy or formal priority among legal orders.

**ALVAREZ:** Tom Franck would have called these "claims of justice."

**KINGSBURY:** Our discussion today has not yet focused on the reality that a lot of the discussion of global governance has mainly a North Atlantic provenance and sensibility. Because of the experience of the E.U. and European projects, and of the U.S. and North American and transatlantic projects, there's a lot of thinking in the North Atlantic world about how to organize power in these governance-different modalities, how to evaluate it, and what place law and legality have in it.

But global issues require a somewhat different way of thinking and talking, some different ideas and structures with wider appeal and in which the concerns of the whole world participate. All of us have struggled with how to think about ideas from China and India and other major cultures and polities with very sophisticated, different sets of ideas—and with how to think about extreme inequality.

The indicators project we have launched in the Institute for International Law and Justice shows this pattern very acutely. Almost all the major global indicators are produced in the developed countries. But the "indicated," the countries who mainly have incentives and are mainly affected by this, are principally in the south. Of course, many indicators rate and rank all the countries, but the countries



BETH SIMMONS



ANDREW HURRELL



who are really pressed by these rankings to change, the countries who need the World Bank soft loans or the support of aid agencies, and who are most often criticized for this or that poor performance on some indicator, are mainly—although not always—the poor or middle-income countries, the nonproducers of the indicators that measure them. Many of us around the table have tried to work on global governance issues with the perspective of partner institutions in different developing countries. But our conversation today has not yet quite brought out the basic tensions in applying North Atlantic experiences and sensibilities to truly global issues: the justice questions, the participation questions, the real voice questions, the issue of whether new concepts, new techniques, new language are going to have to be developed—and contested—alongside or in succession to the export of dominant models that all of us here are somewhat in the business of doing.

**HURRELL:** One needs to make a distinction between where influential academic work comes from and how it is used and becomes politicized. In the case of globalization, the debates and academic literature grew up faster outside of the U.S. because that's where the people were who were more affected by it. Academically, though, many people simply didn't pay much attention to the work that was being generated outside the U.S. until globalization hit the U.S., especially the negative impact.

I've done some crude little Google searches on when global governance as a term and idea starts to appear and in which places. Compared to globalization, it is quite recent. It has been developing fast in Europe, well before it hit other places. In the emerging world, there has been a big take-up in use in Latin America, a huge take-up in China, but rather little in India.

**WEILER:** You're underestimating the cleavage in Europe between political science, international relations, and law. If you look at the French philosophers, at the French postmodernists, they get to European law through the U.S. So the Americans pick it up from France, integrate it into their legal work, and then it slowly migrates back into the legal work in Europe. Global governance is the same: It starts in Europe, it migrates to the legal work in some ways in the U.S., and now it's slowly migrating back to the legal work in Europe.

**HURRELL:** In terms of politics, it has been visible. Think of all the work on global governance that's come out of Germany and Scandinavia.

In terms of the Global South, one theme is obviously the counter-hegemonic side and the protest against existing global governance. The other part—that I'm particularly interested in—is the way in which big emerging states view these changing processes of global ordering. Here, the role of small groups of the major players is particularly important. Even quite integrated formal institutions, like the WTO, are still dominated by bargains amongst particular players and by small clubs of states. In terms of the emerging architecture of global governance, gaining access to these clubs and groupings has become particularly important for rising powers.

One of the dominant imperatives for big developing countries is to try and work out exactly where power is in these different groups, and to try and get in, reshape, and refashion these clubs, such as the G-20—not only for interest-based reasons but also because access matters for status, prestige, and achieving a sense of getting a voice in the world. So I think that the issue of how ideas of global governance have spread, how they are understood, and that how this then translates into the goals and perceived interests of different actors, is one of the really interesting aspects of what global governance means on a global scale.

**ALVAREZ:** In Europe, if we gathered 12 people around the table, especially international lawyers, would the conversation bear any

resemblance to ours today? My impression is that legal positivism has a greater hold in Europe, and that not only would those people not talk about indicators, they probably also wouldn't be talking about "governance."

**KLABBERS:** Well, it depends a bit on which 12 Europeans would be around the table. What is probably more American than European is just the interdisciplinary thing.

**ALVAREZ:** Is that a good thing?

**KLABBERS:** It's not by definition bad or good. If it comes to be domination by one discipline over the others, then it's not necessarily all that useful. But if it's based on parity and making use of each others' insights and trying to bring each others' blind spots to each others' attention, then I don't see anything particularly wrong with it.

**PALOMBELLA:** There is much development in many different countries and beautiful political science work on governance. The question has become how all these disciplines interact. I believe there is a worldwide awareness of the fact that nothing here can be addressed only from a legal perspective.

**SIMMONS:** One of the essential questions global administrative law deals with that is so important and actually is the title of a classic book in political science, is "Who governs?" And one could add: "And how?" How are people gaining power, governing, and exercising that power?

The paradigm of global administrative law seems to be able to highlight the need for really good descriptive perks, about who governs and how they're doing it. We need a good description to include things like, "Who are the players?" Not just firms, governments, councils, but who are the repeat players that counsel the respondent states and the arbitrators that again and again are at the table, and again and again are cited by others who end up creating, eventually, accumulating what we might call law in this area.

The other question is "What are the consequences in certain areas of putting so much weight on law generation through litigation?" It's a way of generating rules and law where the agenda is controlled by the complainants. And the complainants are almost always, though not exclusively, companies and firms.

**STEWART:** I want to raise a different issue, namely the relation between our students and the legal profession. In my experience through the Hauser Global Law School Program, students are not only intellectually interested in the law-and-governance perspective but find it tremendously professionally useful. Those who want to work in the global arena, including international organizations, NGOs, human rights bodies and groups, or law firms in the U.S. or abroad working in investment trade or global regulatory law areas, find that our courses, centers, and programs dealing with global legal issues equip them to be more effective and successful. The global governance perspective has not penetrated the great mass of our students or the legal profession. The situation is different in Europe, where you are dealing with a supranational governance system. At NYU we are working, through the activities of the global law school programs as well as our teaching and research, to change that. On the normative part, we see global administrative law as providing not only important issues for academic study but tools for reform-minded lawyers who want to improve governance in some sense.

**ALVAREZ:** Well, on that note, we will conclude. Thank you all for participating in this great conversation. □



**RICHARD STEWART**



# WILF HALL

*An Illustrated Guide to*

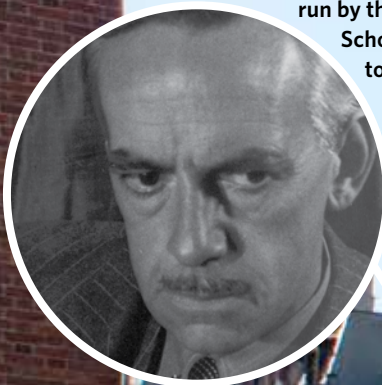
## THE ROOF IS ALIVE

A green roof and two planted terraces, bedded with grasses, ferns, and trees, will help insulate the building year-round and filter pollutants out of rainwater, thereby reducing runoff into the city's sewers. Terraces on the second and sixth floors serve as informal meeting areas, with walking paths enclosed by creeping perennials and grasses.



## PRESERVATION HALL

Established in the 1920s, the Provincetown Playhouse premiered many of Eugene O'Neill's plays. Wilf Hall retains all four walls of this historic gem, which will continue as a working theater run by the Steinhardt School of Education to hold classes, readings, and storytelling evenings, and debut new music.



## PLATINUM STANDARD

Designed and constructed to join an elite few New York City buildings that attain the highest certification of the U.S. Green Building Council's Leadership in Energy and Environmental Design, Wilf Hall will be evaluated in five categories including water and energy efficiency, indoor environmental quality, and innovative design. Notable features include bicycle storage and showers for commuting riders, and the green roof and terraces.





A signature feature of NYU School of Law is its many prominent and active centers and institutes. Their growth in size and number—plus the demands of an innovative and enterprising academic community—compelled NYU Law to expand its physical plant. Wilf Hall, at 139 MacDougal Street, will officially open in October 2010 as a campus destination for faculty, students, and research scholars from an array of disciplines to exchange ideas and, through their work, shape the public discourse around the leading social and political issues of the day.

#### PATRON VIKINGS

Law School Trustees Leonard Wilf (LL.M. '77) and Mark Wilf '87, partners in real estate development firm Garden Homes, generously underwrote the hall. The cousins' gift is one of several important contributions the Wilf family has made to the Law School, including the Wilf Family Professorship of Property Law, established in 2002. Leonard, Mark, and Mark's brother Zygi are also co-owners of the Minnesota Vikings.



#### THE A-TEAM

Lillian Zalta, assistant dean for operations and administrative services at NYU Law, and Kenny Lee, construction director at NYU, led the successful collaboration of Law School and University staff, architects, engineers, consultants, and construction managers and workers, particularly Morris Adjmi Architects and Skanska, that built Wilf Hall.



#### A CENTER FOR CENTERS

Intended to be a central gathering place for scholars, Wilf Hall will house a dozen centers, programs, and institutes, plus an admissions welcome desk on the main floor, and admissions offices and offices for academic fellows below.

Graduate Admissions (LL.M. & J.D.)  
J.D. Admissions  
Bickel & Brewer Latino Institute for Human Rights  
Center on the Administration of Criminal Justice  
Center for Human Rights & Global Justice  
Center for Labor and Employment Law  
Center on Law and Security

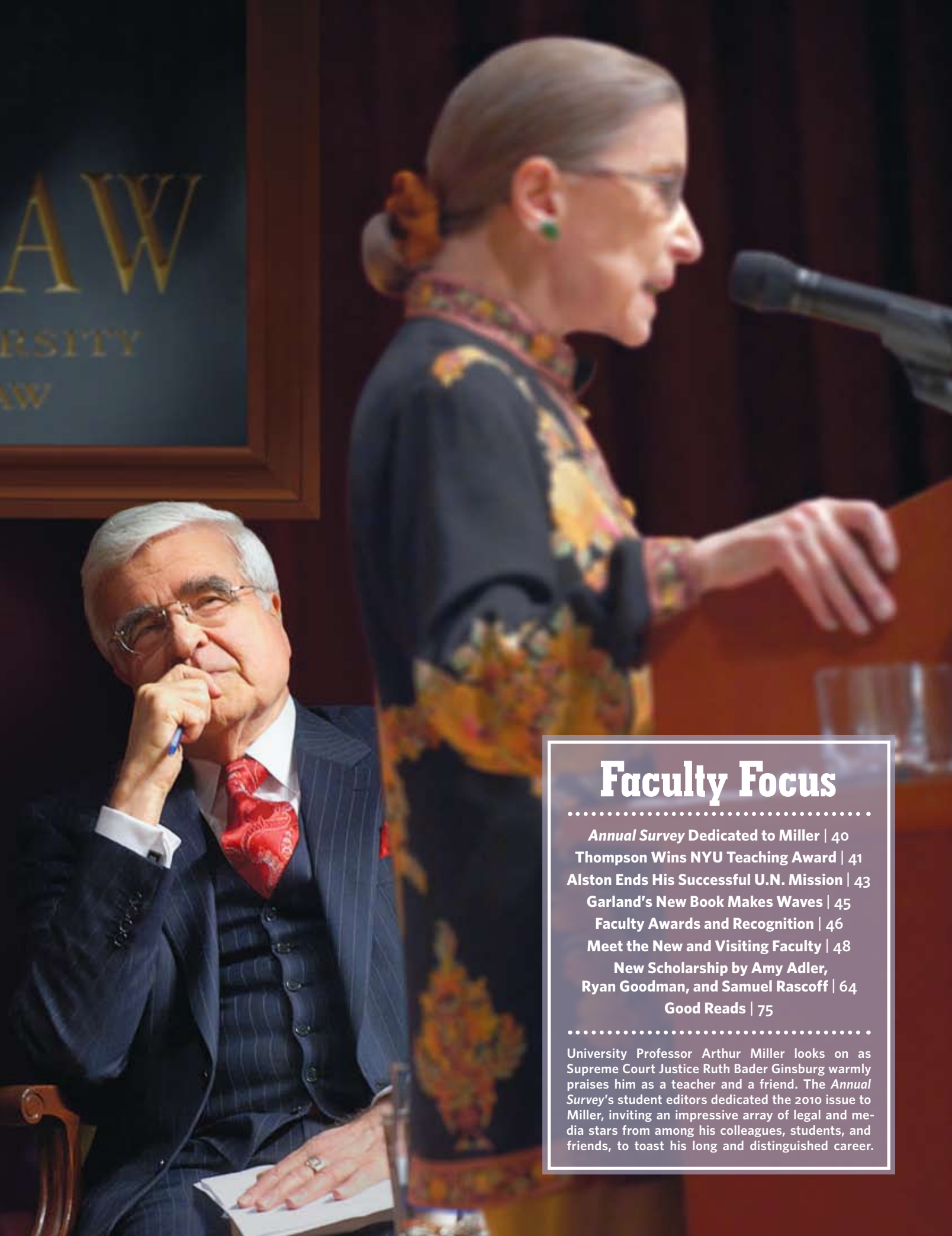
#### CORNER OF THE PARK

This new addition establishes a true campus for the Law School in Greenwich Village, with four academic buildings (shown in orange) in the vicinity of Washington Square Park. Two residence halls (shown in peach) are a short stroll away.



Architectural rendering courtesy of Morris Adjmi Architects.





## Faculty Focus

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*Annual Survey Dedicated to Miller* | 40  
*Thompson Wins NYU Teaching Award* | 41  
*Alston Ends His Successful U.N. Mission* | 43  
*Garland's New Book Makes Waves* | 45  
*Faculty Awards and Recognition* | 46  
*Meet the New and Visiting Faculty* | 48  
*New Scholarship by Amy Adler,  
Ryan Goodman, and Samuel Rascoff* | 64  
*Good Reads* | 75

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University Professor Arthur Miller looks on as Supreme Court Justice Ruth Bader Ginsburg warmly praises him as a teacher and a friend. The *Annual Survey's* student editors dedicated the 2010 issue to Miller, inviting an impressive array of legal and media stars from among his colleagues, students, and friends, to toast his long and distinguished career.



Friedman



Gibson



Ginsburg



Gutman



Sack



Sexton



Shapiro



Silberman



Toobin

# Stars Shine on Miller

Laughter and smiles abound as current and former students, colleagues, and friends dedicate this year's *Annual Survey*.

A PARADE OF LUMINARIES FROM THE worlds of law and media appeared at the April dedication to Arthur Miller of the 67th volume of the *Annual Survey of American Law*. Collectively, they paid tribute to him in his many incarnations: teacher, mentor, scholar, practitioner, TV personality, and friend. "Arthur Miller, like life, is best viewed not through a single window, but through the many facets of a diamond," said NYU President John Sexton. "This special man has many sides to him."

Miller, who joined NYU Law in 2007 as a University Professor after 35 years at Harvard Law School, is a singular figure in American law and culture. Both in and out of the classroom—clad in his trademark three-piece suit and red tie and pocket square—he presents a carefully crafted persona, fearsome and imperious. But as those offering accolades made clear, this is a front, behind which is a person capable of touching people deeply and offering them life-changing inspiration. "Everyone who has taken one of Professor Miller's classes remembers the experience," said Danielle Kantor '10, the *Annual Survey's* editor in chief.

Supreme Court Associate Justice Ruth Bader Ginsburg, who flew in from Washington just to speak at the dedication ceremony, offered personal observations dating

to 1957, when she and Miller were both law students at Harvard. Back then, she noted, "he was a wee bit shy, would you believe?" Years later, she recounted, her daughter's decision to take Miller's copyright law class at Harvard "determined her life's work." (Jane Ginsburg now teaches intellectual property at Columbia Law School.) Ginsburg also read a statement from her fellow justice Stephen Breyer, who said Miller "has helped thousands of law students understand the intrinsic interest in, as well as the human importance of, the law." Another jurist, Robert Sack of the U.S. Court of Appeals for the Second Circuit, praised Miller's work in privacy law.

The field of civil procedure connected many of the ceremony's speakers to Miller, co-author of the 31-volume *Federal Practice and Procedure*. It was because he took Miller's civil procedure class, Sexton said, that he went on to teach the subject. (In addition to serving as NYU's president, Sexton is the Benjamin F. Butler Professor of Law at the Law School.) Two other distinguished civil proceduralists took to the podium to honor their longtime colleague. "Though I was technically his senior, he was always my mentor," said David Shapiro, a visiting professor at NYU Law and colleague from Harvard Law School. And Martin Lipton

Professor of Law Linda Silberman, who was Miller's student and summer research assistant at Michigan Law School, noted that she "learned more in that summer than I did in the rest of my law school years."

But Miller's star power has extended far beyond the walls of academia. Most notably, he hosted his own TV shows on the law, *Miller's Court* and *Miller's Law*, and served as a legal commentator on many others, including ABC TV's *Good Morning America*. Indeed, Jeffrey Toobin, a legal analyst for CNN Worldwide and the *New Yorker*, credited Miller with pioneering TV coverage of the courts. "Arthur was the first person—the very first person—to recognize that law could make compelling television," Toobin said. Longtime *Good Morning America* anchor Charles Gibson said, "In my 33 years at ABC, I can count on one hand those academics who could make their subjects come alive for a mass audience. There's no better teacher than Arthur Miller."

Lawyers who have practiced with Miller praised his wide-ranging expertise—Simpson Thacher & Bartlett partner Henry Gutman for Miller's work on copyright cases; Brad Friedman, a partner at the Milberg law firm (where Miller is now special counsel) for his guidance in class action litigation.

When it came time for Miller himself to speak a few words at the close of the dedication ceremony, he confessed that he was "filled with all sorts of emotions." He offered: "I'm honored, I'm humbled. I might say I'm speechless—but nobody would believe that." □ Michael Orey



## Pressing for Fed Reform

For Professor Oren Bar-Gill, 2010 has been the year to make some waves with the feds. An outspoken supporter of the new Consumer Financial Protection Agency, Bar-Gill spearheaded a conference on financial regulatory reform this past winter, knowing that Congress was still hammering out reform legislation. And in the spring, he delivered the message to federal officials that cell phone carriers may need some oversight, too.

At the January conference Bar-Gill led, "Regulating Consumer Financial Products," which was co-sponsored by the Federal Reserve Bank of New York and the NYU School of Law, panelists, including several NYU Law professors, addressed the failures in consumer credit markets and what kind of oversight is needed. "The question of 'Do we need any regulation?'—we're past that," Bar-Gill said. "What we need to ask is how to regulate in the most effective way."

In April, Bar-Gill and Rebecca Stone '09 presented their findings on consumer confusion about cell phone contracts to the Federal Communications Commission, and Bar-Gill is discussing potential new wireless regulations with the FCC. Mistakes in picking a cell phone plan cost U.S. consumers \$12 billion a year, Bar-Gill and Stone estimate. According to their research, carriers design contracts with the knowledge of "systemic mistakes and misperceptions." Subscribers either underestimate their monthly usage, resulting in overage fees, or overestimate it, leading them to pick unnecessarily expensive plans.

The academy is recognizing Bar-Gill too: In May, he was elected to the board of directors of the American Law and Economics Association.



## Kudos to a Dynamic Teacher

**T**WICE THIS PAST YEAR, NYU HONORED Professor of Clinical Law Anthony Thompson for his teaching and positive influence on the community.

Thompson earned the student-, faculty-, and alumni-nominated Distinguished Teaching Award last April, given to faculty members across the University who have made significant contributions to NYU's intellectual life through teaching. He received a medal and a \$5,000 grant. Last January, Thompson was presented with the student-nominated Martin Luther King Jr. Faculty Award, for exemplifying King's spirit by making a favorable contribution in the classroom and the greater University community. The prize carried \$2,500 for research funding.

A 14-year veteran of the NYU Law faculty, Thompson teaches the Criminal and Community Defense and the Offender Reentry clinics and explores the effect of race, power, and politics on individuals and communities as they come into contact with our justice system. Current and former students laud his dedication and insight, especially when teaching courtroom skills, and his engagement with ideas about crime and communities.

"He is an amazing trial lawyer," says Shanti Hubbard '09, E. Barrett Prettyman Fellow at Georgetown University Law Center. Vanessa Pai-Thompson '08, a trial attorney at Brooklyn Defender Services, praises Thompson as a teacher and mentor who instills con-

fidence in students. "He's very good about trying to approach his students not just as students but also as professionals," she says, "giving you the opportunity to rise to the occasion." Eli Northrup '11 agrees: "I'd never given any sort of oral argument. He makes you get up without any notes...it gave me a lot of confidence."

In addition to producing influential scholarship, including his 2008 book, *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics*, Thompson has



served as faculty director of the Root-Tilden-Kern and the Bickel & Brewer Scholarship programs, undertaking administrative responsibilities at the Law School "with remarkable skill and effectiveness and a generous spirit," says Dean Richard Revesz. □

## NYU's Daily Report from Copenhagen

LAST DECEMBER, NINE NYU LAW CLIMATE finance experts headed to Copenhagen, where the U.N. Framework Convention on Climate Change was discussing a new global climate agreement to replace the Kyoto Protocol. While organizing and participating in climate finance research seminars and meetings during their nine-day stay at the conference, the team also sent updates to the NYU community stateside. Almost 44,000 people from around the world registered for the summit, but Copenhagen's Bella Center holds just 14,000—"It became a bit of a traveling climate road show," said Bryce Rudyk (LL.M '08), a research fellow at the Frank J. Guarini Center for Environmental and Land Use Law (CELUL).

In "Dispatches from Copenhagen," a daily CELUL Web report that was also featured on the NYU Law Web site, Rudyk and others captured the official business inside and the hectic scene outside, where most of the attendees were positioned during the two-week event. "The dispatches were our attempt to provide some insight to the progress of the negotiations and the issues that were coming up for climate finance," Rudyk said, "and also provide some on-the-ground impressions of the utter insanity of the conference." In January, more dispatches followed when University Professor Richard Stewart, faculty director of the Guarini Center, reported from the World Future Energy Summit in Abu Dhabi. □

# New Chairholders Deliver Inaugural Lectures

**VICKI BEEN '83**  
Boxer Family Professor  
of Law



## **Taking Stock: What the Bloomberg Rezoning Means For New York City's Development Future**

**NOVEMBER 2**

In the first eight years in Michael Bloomberg's mayoralty, amendments to the 1961 zoning plan have dramatically altered the city, Been said, affecting 8,400 city blocks and more than 20 percent of the city's land.

**"Where are all these new New Yorkers going to be housed, and at what cost? We need to think about how the rezoning process can ensure that the benefits and burdens of growth are fairly distributed. Once a rezoning is done, it's in place for a long time. It's important to understand what the implications will be 25 years from now."**



Leonard Boxer '63, with Been

**MARK GEISTFELD**  
Sheila Lubetsky Birnbaum  
Professor of Civil Litigation



## **The Field of Torts in Law's Empire**

**JANUARY 14**

In personal injury cases related to the manufacture of products, there is often a "mismatch" between a jury's sense of justice and the standards of liability applicable under tort law, said Geistfeld. He proposed that jurors consider what a well-informed or reasonable consumer would regard as the desirable level of safety and concludes they would therefore select safety designs that pass a cost-benefit test.

**"When you look at consumer expectations about complex product design, what court after court has recognized is that frequently consumers really don't know what to expect. So how could we ask the jury to apply a standard that is so lacking any basis of evaluation?"**



Sheila Birnbaum '65, with Geistfeld

**BARRY ADLER**  
Bernard Petrie Professor  
of Law and Business



## **The Salvation and Subversion of Capitalism: Chrysler, General Motors, and the Use of Government-Sponsored Bankruptcy**


**APRIL 20**

As automakers Chrysler and General Motors teetered on the brink of financial collapse, the U.S. government took action by guiding the corporations through bankruptcy. But Adler questioned this choice. The government's real objective, Adler suggested, was to achieve the effect of nationalizing without suffering the inevitable political fallout.

**"In Chrysler and General Motors, the judges, while well-meaning in following the law as they saw it, diserved the process. We have the salvation of capitalism by preventing breadlines, but we have the seeds of subversion as well."**



Charles Klein '63, right, with Adler

 For lecture videos: [law.nyu.edu/2010mag/lectures](http://law.nyu.edu/2010mag/lectures).



# Taking Nations to Task

The co-chair of the Center for Human Rights and Global Justice ends a critically lauded term at the United Nations.

**P**ROFESSORS RARELY GET THE CHANCE to make governments the world over snap to attention. Philip Alston, John Norton Pomeroy Professor of Law, is a notable and very public exception.

Since 2004, this eminent international law scholar has served as the U.N. special rapporteur on extrajudicial, summary, or arbitrary executions, a position that has allowed him to take more than a dozen governments to task for unlawfully killing citizens. As his tenure concludes, human rights advocates say Alston has approached his mandate with courage, forcefulness, and thoughtful legal analysis, leaving an indelible footprint. “His shoes will be difficult to fill,” says Peggy Hicks, global advocacy director of Human Rights Watch. “Lives have been saved because of his work.”

The Australia-born Alston has used his knowledge of how the United Nations works—he has served in several posts over the last 20 years—to streamline the international human rights monitoring process. And he has used his reputation as a prominent human rights lawyer—he drafted the U.N. Convention on the Rights of the Child—to develop a sound analytical process to assess the legality of government actions. “From the outset, he has been very specific in the ways he engages governments,” says Tania Baldwin-Pask, the international law adviser for Amnesty International in London. “He has provided a level of international legal analysis and a framework that we will be able to use for many years.”

This specificity is documented in more than a dozen extensive reports on issues from blood feuds in Albania to the persecution of witches in the Democratic Republic of the Congo. In addition, Alston conducted 14 fact-finding missions in countries such as Afghanistan, Israel, and Sri Lanka to investigate allegations of unlawful killings and human rights violations.

What set his work apart, however, is that he insisted, over and over, that the governments cough up specific answers to his tough questions. “He does not mince words and is so clear that governments can no longer sidestep what he’s saying,” says Baldwin-Pask. “He’s absolutely tenacious.” Alston would routinely visit countries multiple times, and evaluate and follow up on a government’s response. “In the past, there would be a simple exchange of cor-

respondence,” says Alston. This aggressive approach got results. In 2008, for example, extrajudicial executions in the Philippines fell by two-thirds after Alston released a scathing 65-page report.

Alston has also ruffled feathers. In Sri Lanka, a government minister accused Alston of violating U.N. protocol after he authenticated video footage of Sri Lankan soldiers murdering naked and blindfolded Tamil prisoners. Secretary-General Ban Ki-moon distanced the U.N. from Alston by noting that the rapporteur operated independently. Alston publicized the video report anyway. “He does not kowtow to anyone, thank goodness,” says Baldwin-Pask.



For Alston, there are no exceptions. This spring he pressed the Obama administration repeatedly on its use of drone strikes against suspected terrorist targets in Pakistan, and in June he filed a report with the U.N. questioning whether the strikes complied with international rules of combat because an intelligence agency operated them, not the army.

Alston simply won’t be intimidated. In Kenya in February 2009, he didn’t pull punches even after authorities harassed many who helped him investigate police death squads and two prominent human rights defenders were assassinated just two months after he left the country. Instead, Alston cited both incidents in a 45-page report about how police arbitrarily killed 24 suspects while in custody. He also called for the resignation of the attorney general. “My report forced the

issue onto the front pages, not just for days or weeks, but for months,” says Alston, who noted that the official was eventually reassigned. “The reports can be very powerful. Not because the Human Rights Council or the U.N. follows up on them; they don’t. But because civil society picks up on them.”

But sometimes even that is not enough. To conduct an official U.N.-sponsored fact-finding mission, U.N. special rapporteurs must be invited to enter the country. China, Pakistan, Iran, India, and Saudi Arabia have all denied him access. “The worst offenders don’t issue an invitation,” Alston says. “That’s the system’s real weakness.”

After six years of interviewing eyewitnesses to crimes against humanity, Alston has developed a professional distance. “I don’t have emotional problems in dealing with these issues in the abstract,” he says bluntly. But sometimes the full weight of the horrors does emerge. “When someone

walks in, shows me a picture of her son, and asks me to help her, it’s harrowing, hearing this destroyed mother and not being able to do anything,” he says, lost in the memory of a mother whose son was murdered in Soacha, a Bogotá suburb. The boy was one of the so-called falsos positivos (false positives)—young men lured to remote locations by soldiers, then killed and photographed to appear as if guerrillas had shot them. “I try to get justice for those that have been killed,” he says with eyes welling up. “But the truth is, I can do very little for specific individuals.”

Alston’s display of emotion seems to catch him off guard; even though he has had the rare opportunity to sling arrows that embarrass and hurt his targets, he knows calling the world’s attention to these crimes, however useful, won’t erase the pain of their victims. □ *Dody Tsiantar*

# A Tribute to a Legal Historian's Lasting Influence and Legacy

**W**ILLIAM E. NELSON '65, JUDGE Edward Weinfeld Professor of Law, has been associated with the NYU School of Law for nearly half a century, and has been an active legal historian for almost as long. He has spent more than 30 of those years as a professor. A two-day conference last May, "Making Legal History," honored the scope of Nelson's influence.

Nelson has helped to cement NYU Law's reputation as a legal history leader. He moderates the Legal History Colloquium, which he founded in 1982. Nelson has also played an integral role in the Samuel I. Golieb Fellowship in Legal History Program,



the oldest fellowship of its kind. The Golieb Fellowship has become a mandatory training ground for promising legal history scholars who come to NYU Law to conduct research and present their work in the colloquium before going on to secure top teaching spots in their chosen specialty.

Former Golieb Fellows presented original scholarship in panels over the course of the conference, on topics such as 19th-century U.S. legal history, the legal history of race, and courts and judges. Panel chairs included Vice Dean Barry Friedman; Charles Seligson Professor of Law Daniel Hulsebosch; AnBryce Professor of Law Deborah Malamud; Professor Troy McKenzie '00; Vice Dean Liam Murphy; and John Phillip Reid (LL.M. '60, J.S.D. '62), Russell D. Niles Professor of Law Emeritus.

Hulsebosch, who organized the conference, wanted to harness the power of the

Golieb Fellows' scholarship. "The Goliebs represent some sizeable proportion of all legal historians who have come out of graduate school or law school over the last generation," said Hulsebosch, a former Golieb Fellow himself. "I wanted the focus in large part to be on the scholarship, to show how much of an influence Bill has had on all these people who are producing the best work in the field."

Colleagues discussed Nelson's influence in the field of legal history. More than one panelist invoked "generosity" as the honoree's primary characteristic.

Morton Horwitz, Charles Warren Professor of American Legal History at Harvard Law School, recalled the days when he and Nelson were Charles Warren Fellows at Harvard, each researching their first books. Nelson tirelessly combed various courthouse archives for his primary research, Horwitz recalled, but remarkably, freely shared the fruits of his labors with Horwitz.

"I have not seen that in the remaining 40 years of my academic life," Horwitz said. "It was a sense of generosity and an investment in a common purpose. We were going to make legal history a field; we needed to try to help each other as best we could. Bill really did make a big difference in my understanding of that which I was working on." Horwitz and other panelists pointed to Nelson as a pioneer of digging through original sources to examine everyday cases, in order to better understand developments in the history of the law.

Larry Kramer, dean of Stanford Law School and former associate dean of NYU Law, praised Nelson's contributions to the Law School. "Bill has been incredibly prolific and done work across a ridiculous number of subjects, especially for a historian. Nonetheless, his greatest legacy will be the enormous number of lives he's influenced and careers he's shaped."

Professor Lauren Benton of NYU's Department of History, also an affiliate professor at NYU Law, pointed out that Nelson's generosity extends far beyond the Law School to history graduate students from all over. "Bill has had a profound influence on me and on many who work outside American legal history," Benton said. "He is a global comparative legal scholar, he is a model historian.... He is an institution builder, a field shaper, and a friend." □



## *Two Nations Under God*

Recent elections leave no doubt that our government and the people are each more polarized than at any time since the late 19th century. Richard Pildes, Sudler Family Professor of Constitutional Law, examined the reasons for this extreme state of affairs and the consequences for modern politics in his keynote address for the 12th annual Thomas M. Jorde Symposium that he delivered both at UC Berkeley School of Law in November and at Princeton University in April.

In "Ungovernable America? The Causes and Consequences of Polarized Politics," Pildes argued that today's extreme partisanship dates to the historic Voting Rights Act of 1965, which he called "undoubtedly the most important and most effective civil rights statute ever enacted." That legislation, he said, "unleashed forces that, building on themselves over several decades, have caused a tectonic shift in the underlying foundations of American politics." By enfranchising previously excluded black and poor white voters in the South, the act splintered the one-party region, thereby reconfiguring American politics. The structure of politics today drives moderates out of both parties, Pildes said. No individual, including any particular president, can transcend those larger forces, he added.

In looking at what changes could reverse this polarization, Pildes noted that "seemingly small-scale, micro-level changes in the legal rules and institutional frameworks within which democracy is practiced can have large effects in shaping the nature of democratic politics." In particular, he said, changes in the way primary elections are structured offer the best chance to mitigate partisan divides. Yet Pildes concludes that extreme polarization is likely to endure. For that reason, he argued, we should focus on addressing the consequences, not the causes.



# The Peculiar Persistence of Capital Punishment

In his highly anticipated new book, David Garland explores what keeps the death penalty alive in the United States.

**D**AVID GARLAND WAS SCOUTING FOR his next research subject when he came upon an extraordinarily disturbing exhibit at the New York Historical Society: "Without Sanctuary: Lynching Photography in America." The photographs, taken from the 1890s to the 1940s, captured images of "what looked like medieval public executions performed in front of large crowds," he recalls. Although Garland is an expert on crime and punishment—he published *The Culture of Control: Crime and Social Order in Contemporary Society* in 2001—he nonetheless was unaware that such public executions had occurred so recently in America with the cooperation of local law enforcement authorities. "Lynchings were seen as illegal and therefore not part of state punishment, but that is a mistake," says the Scotland native. While they might have violated federal and state laws, "local law enforcement officers and judges colluded and often handed over the prisoner to the lynch mob," he said.

Garland, Arthur T. Vanderbilt Professor of Law, wondered whether the idea of a "local legal system" had applications to another historical anomaly he had been thinking about: America's death penalty. Although most Western countries abolished the death penalty long ago, capital punishment persists in America. Why? In 2006-07, Garland won a prestigious John Simon Guggenheim Fellowship to pursue this question. His answer can be found in his latest book, *Peculiar Institution: America's Death Penalty in an Age of Abolition*, from Harvard University Press.

In *Peculiar Institution*, Garland "places the death penalty in the context of American social and political history, and in the context of world history in a more sophisticated way than has ever been done before," says James Jacobs, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts. Adds Bryan

Stevenson, who teaches the Equal Justice and Capital Defender Clinic: "It's a brave work that doesn't retreat from the legacies of lynching and apartheid, which can't be separated from the modern death penalty."



**Despite the Supreme Court's effort... the specter of lynching continues to haunt the system...to the present day.**

Using the lenses of a sociologist and historian, Garland sets out to answer three puzzling questions: 1. Why has America diverged from other Western nations in retaining the death penalty? 2. How has the death penalty acquired its strange contemporary forms? And, 3. Why does America spend so much time, money, and effort maintaining a system that is so inefficient? While 12,000 homicides are committed every year, just over 100 convicted murderers are sentenced to death, with one-third of that group eventually executed after 12 years of appeals. "It seems obvious that the death penalty is primarily about politics and culture, symbolism and gestures, and much less about crime control," says Garland.

In his book, Garland argues that the death penalty has persisted in America for the same reason it was abolished so early in some states (Michigan banned it in 1846): the country's commitment to a radical form of federalism. Like lynching, perhaps the death penalty persists purely because local legal systems allow it. Our political system pushes the power to punish down to state legislatures, local prosecutors, judges, and juries. This local power allowed some

states to outlaw capital punishment well before other Western nations did. But it also allows many high-crime states with hostile economic and racial divisions—especially those with a history of slavery and lynching—to hold onto the death penalty. "Capital punishment is often understood as a necessary means of crime control," Garland says. "But it is better understood as a kind of retaliation against those whose human worth is not valued by their neighbors."

Garland also traces the history of Supreme Court capital punishment cases, including *Furman v.*

*Georgia* (1972), argued by Anthony Amsterdam, now a University Professor at NYU, which led to a moratorium, and *Gregg v. Georgia* (1976), which lifted the ban. This litigation led to safeguards against arbitrary executions, but it also produced layers of legal process that rendered them less effective. The U.S. death penalty is now an attenuated system of delays, deferrals, and inordinate expense.

What keeps the system going is the convergence of political, professional, and popular interests. Politicians know the death penalty is popular with their constituents. Local prosecutors use it to elicit information and guilty pleas. Victims and juries feel wrongs are righted. And the media embraces its entertainment value. "Death provides drama, fascination, and attraction," says Garland. "In the same way that lynchings drew large numbers of people, the death penalty draws us in."

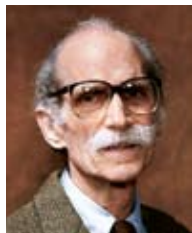
Though *Peculiar Institution* is a social science study that takes a detached view of capital punishment, Philip Smith, who teaches criminology at Yale University, believes the work nevertheless will raise doubts about the death penalty. "Should we feel good about killing people to affirm our autonomy from Washington?" he says. "Garland implicitly suggests that it is immoral to kill people for the sake of electoral or identity politics." Fordham University School of Law Professor Deborah Denno concurs: "Ironically, by improving our understanding of the persistence of the death penalty in the United States, Garland may help abolitionists to develop more effective strategies." □ Jennifer Frey



# Laurels, Accolades and Appointments

## LIFETIME ACHIEVEMENT AWARD

University Professor Anthony Amsterdam received the Lifetime Achievement Award of the National Coalition to Abolish the



Death Penalty at the NCADP's annual conference in Louisville, Kentucky, in January. Recognized for his "lifelong commitment to justice and extraordinary contribution to the cause of

challenging and ending capital punishment," Amsterdam joins eight others who have received the honor, including former Illinois Governor George Ryan, who issued a statewide moratorium on executions.

## KEYNOTE LECTURE

Last November, Russell D. Niles Professor of Law Oscar Chase presented the keynote speech at Fordham University School of Law's 4th Annual Alternative Dispute Resolution Symposium, "The Relationship Between Culture and Disputing Processes."



Chase discussed both U.S. and non-Western disputing procedures, and the connection between culture and the rules people use to govern their disputes. The symposium also featured a panel discussion of the topics raised by Chase's lecture.

"I am very pleased that the Fordham Dispute Resolution Program considered the important relationship between disputing and culture," Chase says. "The connection is critical but too often ignored."

## BEST 2009 ARTICLES



Choi

Murray and Kathleen Bring Professor of Law Stephen Choi and George T. Lowy Professor of Law Marcel Kahan have repeated their appearance on *Corporate Practice Commentator's* annual list of the Top 10 Corporate and Securities Articles, which is voted on by corporate law professors.



Kahan

The journal's 2009 poll considered more

than 500 articles published and indexed in legal journals in 2009. Making the cut were "Director Elections and the Role of Proxy Advisors" by Choi, Kahan, and Jill Fisch, from the *Southern California Law Review*, and "How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity" by Kahan and Edward Rock, in the *Emory Law Journal*.

Over the 16-year history of the poll, Kahan has written or co-written more top-10 articles than any other author, with a total of 13. Choi ranks second with a total of 10.

## INAUGURAL LECTURE

Last October, Frank Henry Sommer Professor of Law Ronald Dworkin delivered the inaugural Frederic R. and Molly S. Kellogg Biennial Lecture on Jurisprudence, a new series of talks on legal philosophy at the U.S. Library of Congress.



In "Is There Truth in Interpretation? Law, Literature, and History," Dworkin put forward the idea that interpreting the constitution is fruitful only if one understands how to interpret interpretation. "We must not make the mistake of thinking that in the end there's an algorithm—that law is really a science," Dworkin said. "Law is not literature, but it is closer to poetry than it is to physics or even economics."

## HONORARY PRESIDENCY

Theodor Meron, Charles L. Denison Professor of Law Emeritus and Judicial Fellow, was elected honorary president of the American Society of International Law, a nonprofit organization dedicated to promoting international relations and the study of international law.



Meron was president of the International Criminal Tribunal for the former Yugoslavia (ICTY) from 2003 until 2005, and currently serves as a judge in the Appeals Chambers of the ICTY and the International Criminal Tribunal for Rwanda. He was co-editor in chief of the *American Journal of International Law* and is now an honorary editor.

The honorary presidency was last bestowed on the late Thomas Franck, Murry and Ida Becker Professor of Law Emeritus.

## BOARD ELECTION

In March, New York University President and Benjamin F. Butler Professor of Law



John Sexton was named chair of the American Council on Education's Board of Directors. Sexton will serve a one-year term with ACE, the major

coordinating body for all U.S. institutions of higher education.

## SUPREME COURT CITATIONS

Spring brought a shower of Supreme Court citations of faculty scholarship. On June 24, the Court ruled 8-0 in *Morrison v. National Australia Bank* that a class of foreign plaintiffs suing a foreign issuer on a foreign exchange could not bring suit under section 10(b) of the Securities Exchange Act. Justice Antonin Scalia cited "Transnational Litigation and Global Securities Class Action Lawsuits," a 2009 *University of Wisconsin Law Review* article by Stephen Choi and Martin Lipton Professor of Law Linda Silberman, in which the authors propose a uniform, bright-line exchange-based presumptive rule in determining the reach of U.S. securities laws.

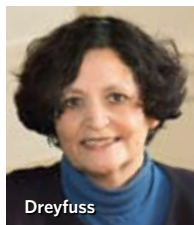


## D.A. Adviser

New York County District Attorney Cyrus R. Vance Jr. appointed Professor Rachel Barkow last March to the Conviction Integrity Policy Advisory Panel, a body of criminal justice experts that will advise the D.A.'s office on national best practices and evolving issues in connection with Vance's new Conviction Integrity Program. The program aims to prevent wrongful convictions and investigates claims of innocence by those already convicted.



On June 16 in the business method case *Bilski v. Kappos*, the Supreme Court rejected the 1998 U.S. Court of Appeals for the Federal Circuit decision in *State Street Bank &*



Dreyfuss



Silberman

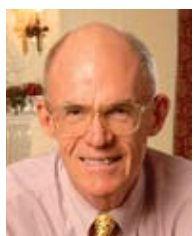
*Trust Co. v. Signature Financial Group, Inc.*, which approved the patenting of any advance that achieved a useful, concrete, and tangible result. In his concurring opinion, Justice John Paul Stevens wrote that he would have gone further and barred patents on all business methods, citing more than once the 2000 article, "Are Business Method Patents Bad

for Business?" by Rochelle Dreyfuss, Pauline Newman Professor of Law.

On May 17, in the majority opinion for an international child custody case, *Abbott v. Abbott*, Justice Anthony Kennedy cited a 2000 article by Silberman, "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues." The same day, Justice Clarence Thomas cited Rachel Barkow's 2009 article "The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity," in his dissent in *Graham v. Florida*, in which the Court determined that it is unconstitutional to sentence juveniles convicted of non-homicide offenses to life without parole.

#### ABA EXCELLENCE AWARD

University Professor Richard Stewart, who is also John Edward Sexton Professor of Law and chair and director of the Frank J.



Guarini Center on Environmental and Land Use Law, received the 2009 Award for Excellence in Environmental, Energy, and Resources Stewardship from the American Bar Association's

Section of Environment, Energy, and Resources, last September. The organization cited Stewart's "demonstrated and recognized leadership," including in litigation related to the Exxon Valdez oil spill and the degradation of the Florida Everglades when Stewart was assistant attorney general in the Environment and Natural Resources Division of the U.S. Department of Justice during the administration of George H.W. Bush. □

## Faculty Transitions

**F**AMILIAR FACES ARE MOVING into new positions as the NYU School of Law enters the 2010-11 academic year.

Barry Friedman, Jacob D. Fuchsberg Professor of Law, and Liam Murphy, Herbert Peterfreund Professor of Law and Philosophy, stepped down from their vice dean positions at the end of the Spring 2010 semester after three years of service. During his vice dean-ship, Friedman revamped orientation for incoming students and created the NYU Law Forum, a weekly event where panelists analyze current events, intellectual ideas, and professional training. (See "Meetings of the Minds" on page 82.) Friedman worked to improve the Law School's clerkship process, academic careers programs, and its public spaces as well.

In the past three years Murphy has overseen complex logistical issues such as the management of class scheduling both in New York and in the NYU/NUS graduate program in Singapore, resulting in the reduction of first-year section sizes. He has helped launch two new LL.M. degrees as well as a masters in law and Jewish civilization. Murphy also spearheaded efforts to put course evaluations online and implement a new student registration system.

Stepping in as the new vice deans are Jeannie Forrest and Randy Hertz. As associate dean for alumni relations and special events, Forrest recently concluded a \$415 million capital campaign that exceeded its ambitious goal in spite of the global recession (see story on page 110). She will become vice dean for student services and alumni relations, focusing on furthering the quality of the student experience related to student services and intellectual life, and will continue to oversee alumni relations and special events.

Hertz, faculty director of the Clinical and Advocacy Programs since 2002, also chaired the American Bar Association's Section of Legal Education and Admissions to the Bar, the accrediting agency for U.S. law schools. A highly active teacher and mentor, he will now also oversee the Law School's curriculum in his vice dean position.

NYU Law's nationally recognized Lawyering Program also underwent a transition when Peggy Cooper Davis, John S.R. Shad Professor of Lawyering and Ethics, stepped down after 11 years as the program's faculty director, handing the reins to the former associate director, Andrew Williams '02. Davis, named one of the three most influential people in legal education by *National Jurist* in 2009, will direct the Law School's new Professional Pedagogy Laboratory, whose purpose is to



Friedman



Forrest



Murphy



Hertz



Davis



Williams

design experiential teaching strategies, research the effects of those methods, and promote experiential learning in the profession. She will also oversee second-level simulation courses at the Law School.

Williams focuses on criminal law and collateral consequences in his academic work. He was a staff attorney for the Bronx Defenders' Civil Action Practice on a Skadden Fellowship after graduating from NYU Law, where he had been a Root-Tilden-Kern Scholar and managing editor of the *NYU Review of Law & Social Change*. He joined the Lawyering Program in 2008.

# New Faculty

## Joshua Blank

**ASSOCIATE PROFESSOR OF  
THE PRACTICE OF TAX LAW  
FACULTY DIRECTOR OF THE  
GRADUATE TAX PROGRAM**

IT IS NOT ENOUGH FOR JOSHUA BLANK (LL.M. '07) to teach courses, write thoughtful scholarship, and, as faculty director of the graduate tax program, administer a program for 400 full-time, part-time, and online students. He also runs four miles round-trip every day at lunch between Washington Square and Battery Park City, where he drinks in the view of the Statue of Liberty. Clearly, Blank, who joined NYU Law in January, thrives on successful multitasking. "Josh is an excellent administrator, teacher, and scholar—really good at all three," says Deborah Schenk (LL.M. '76), Ronald and Marilynn Grossman Professor of Taxation and former faculty director of the program.

Blank, 33, attributes his remarkable capacity to having found his purpose and passion. "This is my dream job," he said. "I view NYU as the center of the tax universe."

He began identifying his dream as an associate at Wachtell, Lipton, Rosen & Katz, when he realized that he most enjoyed his work when he was acting as a teacher, explaining tax policy to his colleagues and clients. Despite the firm's famously grueling hours, he was able to publish two academic papers and also earn an LL.M. "I had to slay dragons," he said, to leave his office once a week at 5:45 p.m., but he found the pull irresistible. "It was a way to think about policy, not just the client of the day."

Blank has a special appreciation for NYU's Graduate Tax Program,

which offered him flexibility when he needed it most. "When my son, Ariel, was born I just could not make it to NYU for every class and juggle my work responsibilities," he recalls. So he participated in the pilot program of the online Executive LL.M. in Taxation in 2005. Rocking his newborn in his arms and viewing video of lectures online, he remembers being grateful that he wasn't "forced to pause progress toward the degree."

Now a sympathetic administrator, Blank has expanded the online course offerings and thoughtfully improved details, like replacing chalkboards that can be difficult for students to read online with "smart tablets" that digitally copy professors' notations. He also encourages professors to use online discussion boards when answering student questions so that more students can participate. The investment in time, money, and effort is worth it, says Blank. "The Executive LL.M. program is the way a lot of legal education will be."

As a professor, Blank displays a similar attention to detail, bringing tax studies alive in the classroom by doing things like playing the Willie Nelson song "Who'll Buy My Memories?" before launching into a review of civil tax penalty rules that are all related to Nelson's problems with the IRS. "Colorful examples are essential to my teaching style," says Blank. Sima Gandhi '07 (LL.M. '10), now an analyst at the Center for American Progress, agrees. "It would have been just as easy to lay out the rules—one, two, three," she says. But "he was passionate and engaged me." She credits Blank with helping her choose a tax-policy career.

Blank's scholarship focuses on tax administration and compliance, taxpayer privacy, and taxation of business entities. In his 2009 article "What's Wrong with Shaming Corporate Tax Abuse," published in the *Tax Law Review*, he probed public attitudes toward corporate taxation to conclude that publicizing corporate tax cheating might backfire and hurt compliance. Shaming individuals has been highly successful, partly because the public views individual tax laws as relatively clear. Because corporate taxation is more complicated, people see corporations as participating in a legitimate "game" to lower their taxes. In fact, investors might reward a tax director who was seen as "pushing the envelope."

But for Blank, who lives in northern New Jersey with his wife, Jessica Blumenfeld, 33, his son, Ariel, now 4, and daughter, Kira, 2, there appear to be few limits in sight as he thrives on being an extraordinary teacher, administrator, scholar, and family man.

—Temma Ehrenfeld

## Ryan Bubb

**ASSISTANT PROFESSOR OF LAW**

GETTING A QUICK GYM WORKOUT WITH THE gregarious Ryan Bubb is a challenge. "People interrupt us, asking him to help solve an economics or a physics problem," says Nicco Mele, an adjunct lecturer at the Harvard Kennedy School of Government and Bubb's close friend. "A workout could take three hours."

A sailor, singer, guitarist, and one-time computer programmer, Bubb has extracurricular activities that are certainly broad, but no more so than his scholarship. His work spans international development law, with a focus on organizational design and the allocation of property rights, to financial institutions and business law. "He is a true polymath," says Mele. "I can argue with him about anything. I'll make it up, but he's actually read up."

Though his first love was physics, for which he won top honors at the College of William and Mary, Bubb switched gears after spending the summer before senior year in rural Haiti. Using his physics know-how, he installed a power system at the local elementary school and was moved by "seeing people who lived in such poverty and without the basic societal infrastructure that I'd taken for granted," he says.

Graduating in 1998 with a desire to "make the world a better place," Bubb became a science teacher at a parochial school in Washington, D.C. "But herding middle





school students didn't play to my strong suits," he jokes.

He entered Yale Law School, where he was an editor of the *Yale Human Rights & Development Law Journal* and delved into the study of economics. "Economic analysis sheds light on the role of legal institutions in shaping incentives in society," says Bubb, an Olin Fellow in Law and Economics. Graduating in 2005 with both a J.D. and an M.A. in economics, he next attended Harvard, conducting fieldwork in Ghana under a Hewlett Foundation grant, and was a graduate fellow at the Federal Reserve Bank of Boston. He expects to receive his Ph.D. this year in political economy and government.

Bubb joins the NYU Law faculty in September after spending a year as a policy analyst for the Office of Information and Regulatory Affairs (OIRA)

and as a senior researcher for the bipartisan Financial Crisis Inquiry Commission, charged with investigating the causes of the current economic meltdown. "Ryan's interests intersect with those of several different groups on our faculty," says Professor Oren Bar-Gill, naming the property law and financial institutions groups, among others. "And through his work for OIRA, he gained valuable insight into the real-world application of cost-benefit analysis in shaping regulation."

Bubb co-wrote a June 22, 2009, op-ed for the *New York Times* called "A Fairer Credit Card? Priceless." The authors take aim at credit card companies that exploit missed payments and other consumer mistakes by levying punishing fees. Comparing investor-owned credit card firms with customer-owned credit unions, they found that although credit unions charge higher upfront costs, they impose smaller and fewer penalties. The findings belie credit card companies' claims that the Credit Card Accountability, Responsibility, and Disclosure Act will force fundamental changes in credit cards. "Credit unions largely conform to the new rules already," they wrote,

"while profitably maintaining the basic features that users know and love."

In a work in progress, "States, Law, and Property Rights in West Africa," Bubb investigates the evolution of property institutions. Drawing on economics, he uses a statistical technique called regression discontinuity to estimate the effects of the divergent de jure property law of Ghana and neighboring Côte d'Ivoire on de facto property rights institutions. He finds that even though the formal laws change when you cross the border, people in both countries maintain similar land-transfer rights. Thus, the results suggest that "a top-down model of legal reform has limitations," he says. "Institutions are determined in large part by a bottom-up evolutionary process."

Bubb, who in December plans to wed Claire Coiro, a Harvard Ph.D. candidate in classics, chose NYU Law for its strength in business law as well as law and development. "NYU is clearly a place where students and faculty are tackling the questions that first captivated me when I was in Haiti," he says. "That's not true at most law schools."—Jennifer Frey

## Franco Ferrari

### PROFESSOR OF LAW

#### FACULTY CO-DIRECTOR, CENTER FOR TRANSNATIONAL LITIGATION AND COMMERCIAL LAW

IMAGINE THE ANCIENT CITIES OF ITALY and their bustling piazzas, the central squares from which all neighborhood activity radiates. Franco Ferrari is much like one of those piazzas—a magnet that draws people to socialize and debate. A gregarious Italian who was born and raised in Germany, Ferrari thrives on joining people and ideas. At least two couples are together thanks to his matchmaking. And a digest of cases worldwide concerning international sales law—all translated into the U.N.'s six official languages—exists because of him.

These skills have other professional applications, too. "He's a conference organizer at the

highest level," says NYU colleague Clayton Gillette. Last March at the University of Verona, where he has taught as a tenured full professor since 2002, Ferrari hosted the inaugural conference of the NYU School of Law's new Center for Transnational Litigation and Commercial Law. "Typically, conferences are rather stuffy and formal. But this was a symposium in the true sense of the word," says Leonardo Graffi, a transactional lawyer at Freshfields Bruckhaus Deringer in Rome and a former student of Ferrari's. "People were firing questions from the audience; everyone was genuinely engaged." Heated discussions spilled over from the formal presentations into informal gatherings at the finest restaurants, chosen by Ferrari. "I'm a very enthusiastic person, whether it's about colleagues, cities, movies, books, or food," says Ferrari, 44, who speaks and writes in German, Italian, English, French, and Spanish, and speaks Dutch.

Joining the full-time faculty this September, Ferrari will teach International Business Transactions and direct the new center. He complements NYU Law's concentration in public international law with an expertise in private international law and substantive commercial law in the international area. "Those of us who engage in comparative work now have a deeply knowledgeable person in Franco, who will enrich our own work," says Linda Silberman, Martin Lipton Professor of Law.

Ferrari has published nine books and some 150 articles, many translated into multiple languages. He is best known for his work on the unification of law, particularly international sales law. He was instrumental to the development of the 2004 *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (CISG), which allows easy access to



case law from 74 countries. "Creating a system by which these tribunals can know how the treaty is being interpreted was a real stroke of brilliance," says Harry Flechtner of the University of Pittsburgh School of Law.

Ferrari is also known for his somewhat controversial view on forum shopping—seeking the jurisdiction that is most favorable to one's clients—a topic on which he will offer a seminar in Spring 2011.

Though he believes in the CISG's goal of uniformity, as a practitioner he advocates taking full advantage of the divergences that still exist. "I'm a realist and a positivist," says Ferrari. "We have not yet reached the level of unification one wanted to achieve with this convention. As long as this is the case, you have to do everything possible to advance your client's interest." He lays out those views in "Forum Shopping' Despite International Uniform Contract Law Conventions," published in the prestigious *International & Comparative Law Quarterly* in 2002. Ferrari is currently writing on European conflict of laws and, of course, the CISG.

A middle child raised in Bavaria by a single Italian mother—"Italians are known for not being that strict, but you should tell that to my mother," he jokes—he developed a rather German work ethic. "He's always in the office," says Gillette. "He's a workaholic in six different languages."

Ferrari earned his J.D. in 1990 from Bologna University and two years later received his LL.M. from the University of Augsburg Law School. In 1995, he accepted a research professorship at Tilburg University in the Netherlands, which allowed him to take on visiting professorships at 15 law schools around the world. He returned to his alma mater, Bologna University School of Law, where he taught as a tenured professor from 1998 to 2002.

From 2000 to 2002, Ferrari served as a legal officer at the U.N.'s International Trade Law Branch in Vienna. In 2005, he visited NYU for the first time as a Hauser Global Visiting Professor; he has wanted to return ever since. "The collegiality I've encountered here, I have not encountered at any other school," he says.

Ferrari, who is divorced with no children, never tires of exploring Manhattan. During his 2005 stay, he ate at a different restaurant every day and walked the streets exhaustively, taking photos that he turned into a beautiful coffee-table book for his fellow professors. Says Ferrari, "That was my way to show my love of this city, and to thank my colleagues." —J.F.



## Daryl Levinson

### DAVID BOIES PROFESSOR OF LAW

WHEN ASKED RECENTLY FOR HIS RÉSUMÉ, Daryl Levinson realized he didn't have one. In 15 years of teaching at three law schools, employers have always pursued him. It's hard to imagine a piece of paper conveying everything that he has going for him anyway. Colleagues rank him among the most original thinkers of constitutional law and theory in the academy. His generosity in mentoring junior faculty is legendary. He's so popular with students that at Harvard Law School, where he had been on the faculty since 2005, the class of 2008 honored him with the Sacks-Freund Teaching Award. In short, says his former Harvard colleague Michael Klarman, "He is the Michael Jordan of the legal academy."

Yet try to pay Levinson a compliment and he'll vigorously try to convince you that you are mistaken. "I don't really do anything important," he says. "Many of my colleagues are real lawyers, involved in high-stakes litigation or helping to run the country. Others are writing scholarship that helps solve real-world problems. I just sit around reading and thinking about idiosyncratic ideas that hardly anyone else cares about, and occasionally I write articles that hardly anyone reads. Then I teach that stuff to the students." Levinson avoids the spotlight so strenu-

ously that he attempted to quash this very magazine profile. But colleagues have developed work-arounds. "When you try to say something nice to his face," Harvard Law professor Gabriella Blum says, "he turns his head sideways, rolls up his eyes, and waves his hand dismissively." She now e-mails her thank-yous.

Levinson, 41, who taught at NYU Law from 2002 to 2005, rejoins the faculty as the first David Boies Professor of Law, after spending last year as an inaugural fellow of the Straus Institute for the Advanced Study of Law & Justice here.

"Daryl is beloved for his commitment to academic values, brilliant mind, helping colleagues push their work to the highest level, spectacular teaching, and for the way he combines personal warmth with darkly cynical wit and humor," says Richard Pildes, Sudler Family Professor of Constitutional Law.

This year, Levinson will teach Constitutional Law and Remedies, subjects that he has taught many times. Yet he will still prepare eight to 12 hours for every in-class hour. Over-preparing is the only way to keep his stage fright under control, says Levinson. But the effort pays off. "You don't go to his class to hear a stale lesson," says former student John Rappaport. "Watching him present a case, break it down and turn it inside out, is like watching someone do a magic trick."

Levinson approaches prevailing ideas with the same skepticism he uses to judge himself. "Daryl specializes in popping ideas—taking apart the conventional wisdom with devastating results," says Yale law professor Heather Gerken. One example is "Separation of Parties, Not Powers," which he co-authored with Pildes and published in the *Harvard Law Review* in 2006. Much of constitutional law and scholarship rests on the assumption that Congress and the Executive Branch are cast in competing roles that check and balance each other; this article points out that the lines of conflict in politics correlate much more strongly with political parties than with branches of government.

Another distinctive feature of Levinson's work is that it often develops ideas that range across conventional legal categories—and beyond. In "Collective Sanctions" (*Stanford Law Review*, 2003), Levinson examines topics ranging from blood feuds in primitive societies to microcredit lending in developing countries to determine when it makes sense to punish a group for the misdeeds of individual members. Similarly, a piece in progress called "Rights and Votes"



explores choices for protecting minorities by drawing from at least a dozen legal and political contexts. “He’s remarkably synthetic in his work,” says David Golove, Hiller Family Foundation Professor of Law.

Levinson’s work is also acclaimed for bridging major scholarly divides. In articles such as “Empire-Building Government in Constitutional Law” (*Harvard Law Review*, 2005) and “Rights Essentialism and Remedial Equilibration” (*Columbia Law Review*, 1999), Levinson applies insights from the economic analysis of corporations and the common law to constitutional law. “By applying the intellectual toolkit of private-law scholarship to questions of public law, Levinson has opened entirely new ways of looking at familiar questions,” says John Jeffries Jr., former dean of the University of Virginia School of Law. His recent work with former Harvard colleague Jack Goldsmith on the parallels between constitutional and international law, including the article “Law for States” (*Harvard Law Review*, 2009), blurs another traditional boundary and creates new possibilities for collaboration and cross-pollination.

Levinson regards his own life with droll detachment. He grew up in Atlanta, where he attended public school. He remembers excelling in eighth grade physics taught by Coach Sport. “Sport—his real name—was hired to coach football, then was relegated to do classroom teaching,” he says. To illustrate the workings of electricity, Sport stripped the wires from a hand-cranked generator and would command students, two at a time, to grab an end. “He would start cranking the generator, and your arm would burn and shake. Whoever held on the longest would get an A,” he says. The students also learned about wind resistance from the wooden paddle that Sport used to maintain discipline.

Levinson credits Coach Sport for his intellectual curiosity. “My friends and I realized that if we wanted to learn anything beyond football and corporal punishment we would have to figure it out for ourselves.”

Harvard University was a culture shock for Levinson. As his ambitions drifted from playing guitar in a punk band to opening a burrito stand, his classmates were “already years into strategizing their ascent to the Supreme Court or Goldman Sachs.” In time, however, he came to appreciate the advantages of not being relentlessly groomed for success. “I saw a lot of people climbing ladders without much thought about why they wanted to get to the top.”

Levinson’s defining intellectual experience at Harvard came when he stumbled

upon Richard Rorty’s *Philosophy and the Mirror of Nature*. “His work showed me for the first time that scholarship could be as profound and sublime as a Nabokov or Faulkner novel.” Earning his B.A. in 1990, Levinson took time off to travel before entering the University of Virginia to study with Rorty himself, and to study law. Graduating in 1995 with a J.D. and, as he describes it, “a hodgepodge of graduate work in philosophy and English,” Levinson, then 26, accepted Virginia’s offer to teach in the law school the following year. “I never set out to become a law professor, I didn’t have the foresight to realize how great a job it would be for me,” he says.

Levinson returns to New York with his wife, Wendy, 40, who plans to restart her publishing career here, their sons Henry, 5, and Oliver, 2, and the family’s labrador retriever, Esther. Teaching at Harvard was “a once in a lifetime opportunity” says Levinson, but he missed NYU Law, he confesses. “The array of interesting people from every discipline, who are either on the faculty or are passing through giving a workshop, doing a colloquium or teaching a course, is really amazing. There’s an intellectual and cultural vibrancy, an openness to new ideas, and a relentlessly forward-looking perspective that makes NYU—and New York City—different from anywhere else in the world.”

## Erin Murphy

### PROFESSOR OF LAW

WHEN BERKELEY LAW STUDENT Joanna Lydgate was conducting empirical research on Mexican immigrants, Erin Murphy walked her through two intensive trips to the border to interview judges, defense attorneys and prosecutors. “Another professor had just told me, ‘good luck,’” said Lydgate, but Murphy also supervised the resulting comment that was published in the April 2010 *California Law Review*. That piece, which formed the basis of two policy reports and a hard-hitting *Los Angeles Times* op-ed, criticized a federal program aimed at criminally prosecuting undocumented immigrants who cross the U.S.-Mexico border.

Erin Murphy, who builds mentoring into her teaching relationships by requiring first-year students to attend her office hours, joins

NYU Law as a tenured professor this fall from the University of California, Berkeley, School of Law where she could be spotted zipping around campus on a powder blue Vespa. A criminal justice scholar with a focus on forensic DNA typing and technology, Murphy, 36, has a reputation for being creative and energetic in the classroom. She experiments with technologies such as handheld voting devices, plays rap music, and shows videos of “The Wire” and other popular TV shows. And at the semester’s end, she organizes a criminal procedure “Jeopardy!”-style game and a criminal law-themed poetry slam. “She loves the material so much, it’s infectious,” says former student Josh Keesan, now a San Diego County public defender.

Murphy’s scholarship is influenced by her own years at the Public Defender Service for the District of Columbia, where she was part of a team of lawyers dedicated to understanding the ins and outs of forensic DNA typing. She found that the law responded clumsily when it came to regulating new technologies, as when debate focused on the intrusiveness of swabbing a suspect’s

cheek rather than the question “What are we going to do with this information?” Two of Murphy’s articles, including her popular DNA primer “The Art in the Science of DNA: A Layperson’s Guide to the Subjectivity Inherent in Forensic DNA Typing” (*Emory Law Journal*, 2008), were cited in a 2009 concurring opinion by Supreme Court Justice Samuel Alito that denied a new DNA test for a convicted rapist. Murphy is currently working on “Relative Doubt: Partial Match of ‘Familial’ Searches of DNA Databases,” to be published in the *Michigan Law Review*, which examines the forensic method of locating partial DNA or possible kinship matches, when exact DNA matches to the crime scene sample are not found.

In “Paradigms of Restraint” (*Duke Law Journal*, 2008), which won an AALS “best paper” award, Murphy argued that the power to control criminals with



new technologies can result in as great a deprivation of liberty as physical incarceration, but that the consequences of these methods have received little constitutional scrutiny. "It's hard to assess the power of the monitoring eye of biometric systems or the virtual prison of a GPS alert," writes Murphy. Says Murphy's former Harvard Law School professor Carol Steiker: "She manages to think in broad terms about these technologies, but also talks with specificity about how the courts should address these problems."

Murphy also looks at nontechnical questions with a fresh eye. "Manufacturing Crime: Process, Pretext and Criminal Justice" (*Georgetown Law Journal*, 2009) looks at prosecutors' use of procedural offenses such as perjury, obstruction of justice and the like, to gain convictions when other evidence is weak. "It's an extraordinarily insightful assessment of a development in criminal justice that many people knew about but that no one had thought about in the way Erin did," says Berkeley colleague David Alan Sklansky.

Growing up in Windermere, Florida, Murphy inherited a joie de vivre and love of literature from her free-spirited mom, Carol, an English teacher and guidance counselor who, her daughter remembers, "thought it was fun to lower the windows in the car wash." She and Murphy's father J. Michael, a steel drum reconditioner with a Harvard M.B.A., raised Murphy and her brother with a sense of civic duty and a commitment to intellectual pursuits. Still, Murphy was no model student. Though she did well in high school, she'd skip classes that bored her, while seeking out extracurricular reading from teachers she admired. "I came to appreciate the real magic that a great teacher can do," she says.

Studying law was never in doubt. "I've always been interested in the art of persuasion, and I love words," says Murphy, who graduated from Dartmouth College with high honors in comparative literature. "Law allows me to use the beauty of language in service of something immensely important." After earning her J.D. from Harvard Law in 1999, Murphy clerked for Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit, then worked at the Public Defender Service in D.C. for five years before joining the Berkeley law faculty in 2005. Murphy, who was a visiting professor at NYU Law last fall, says she was drawn to NYU Law because of New York City's wealth of resources, and the collegiality of the faculty. "There are so many talented, amazing people who meet weekly, share their work and ideas, and talk

over lunch," she said. "That kind of fertile ground is an ideal place to plant yourself if you want to grow as a thinker."

In June, Murphy married Jeremy Tinker, 37, an astrophysicist who will join NYU's physics department as a research professor. "My biggest decision now," she joked a few weeks after the wedding, "is whether the Vespa will have a place in Manhattan." —J.F.

## Sarah Woo

### ASSISTANT PROFESSOR OF LAW

IN THE FALL OF 2007, BEFORE the real estate collapse made national headlines, Sarah Woo and her husband, Kenneth Wee, were driving from Tucson to the Grand Canyon for their annual hike, when Woo noticed a startling number of abandoned properties and foreclosure signs. Once she returned to Stanford Law School, she examined the legal filings and found that a staggering proportion of residential developers that filed for Chapter 11 bankruptcy ended up in liquidation as compared to the past, and that existing scholarship did not look at the banks' financial distress to explain, in part, a bank's preference for liquidation of debtors over Chapter 11 reorganization.

From that inquiry, she developed her doctoral dissertation, "A Blighted Land: An Empirical Study of Residential Developer Bankruptcies in the United States—2007–2008," a timely examination of the role the banks played in increasing asset liquidations and possibly prolonging the current housing crisis. Woo is currently expanding that work into a book. "Some legal scholars understand the law but don't necessarily understand how to do economic analysis. She does both," says Stanford's Alan Jagolinzer, who sat on Woo's dissertation committee. "She is among an elite body of researchers working at the intersection of law and economics."

Woo is also a law and society scholar, mentored by Stanford's Lawrence Friedman, a founding father of the law and society movement. She joins the faculty in September, and will teach international financial regulation and international insolvency.

Woo's research interests center primarily on financially distressed companies

and the legal and regulatory frameworks, domestic and transnational, that they operate in, such as the Basel II Accord. Her preferred methodology is large-scale empirical analysis, for which she is currently building databases on bankrupt companies, based on sources such as court filings and market data.

Growing up in Singapore, Woo was a self-confessed math and computer science geek in high school. She says: "I was that person in class who preferred to spend most of her free time writing computer codes and working out mathematical proofs." At her parents' urging, Woo tried out law at the National University of Singapore. After topping her class in her first year, she stuck with it.

Graduating in 2001 with First Class Honors, Woo went to Baker & McKenzie, where she worked on cross-border financing, bankruptcy, and debt restructuring projects. She left to follow her future husband to Stanford, earning an LL.M. in 2003, then worked as an associate at White & Case in San Francisco, focusing on transactional and bankruptcy work. Some months later, she got

a call from Morgan Stanley, where she had interviewed people for her masters dissertation. "The chance to work on the ground with investors and analysts in an area of my research interest, instead of being a mere observer, was very appealing. I decided to take a chance on adventure."

In 2005, she left Morgan Stanley to join Moody's KMV in New York and London, consulting for financial institutions. She used her qualitative and quantitative skills to build financial risk assessment models. Realizing that legal expertise in corporate bankruptcy was rarely incorporated into quantitative risk models, "I was inspired to bridge the gap between law and finance by gathering data from legal dockets to inform what was happening on Wall Street," she says. She returned to Stanford to build the database and complete her doctorate.

Woo sees her move to NYU Law as a strategic advantage. "It is very important to be in a city where I can meet industry players, and to be at a school that is supportive of interdisciplinary empirical research," she says. "NYU is the place to work on issues relating to financial regulatory reforms." —J.F.





# Visiting Faculty

## KENNETH AYOTTE

Associate Professor of Law,  
Northwestern University School of Law



**When:** Fall 2010

**Course:** Corporate Finance

**Research:** Bankruptcy; corporate finance; economics of property law and legal entities

**Representative**

**publications:** Co-author, "Asset-Backed Securities: Costs and Benefits of Bankruptcy Remoteness," *Review of Financial Studies* (forthcoming); co-author, "Creditor Control and Conflict in Chapter 11," *The Journal of Legal Analysis* (2009); co-author, "Bankruptcy and Entrepreneurship: The Value of a Fresh Start," *Journal of Law, Economics, and Organization* (2007)

**Education:** Ph.D. in economics, Princeton University

## JONATHAN BARNETT

Associate Professor of Law, University of Southern California Law School



**When:** Fall 2010

**Courses:** Contracts

**Research:** Intellectual property, with a focus on technology, organization, and political economy

**Representative publications:** Co-author,

"The Fashion Lottery: Cooperative Innovation in Stochastic Markets," *Journal of Legal Studies* (2010); "Property as Process: How Innovation Markets Select Innovation Regimes," *Yale Law Journal* (2009); "Is Intellectual Property Trivial?" *University of Pennsylvania Law Review* (2009)

**Education:** J.D., Yale Law School

## MICHAEL BARZUZA

Associate Professor, University of Virginia School of Law

**When:** 2010-11

**Courses:** Corporations; Current Issues in Corporate Governance Seminar

**Research:** Corporate law; corporate finance; securities law; law and economics



**Representative publications:**

"Delaware's Compensation," *Virginia Law Review* (2008); co-author, "The Market for Corporate Law," *Journal of Institutional and*

*Theoretical Economics* (2006); "Price Considerations in the Market for Corporate Law," *Cardozo Law Review* (2004)

**Education:** LL.B., Tel Aviv University; S.J.D. and LL.M., Harvard Law School

## VICTOR FLEISCHER

Associate Professor, University of Colorado Law School



**When:** Fall 2010

**Course:** Deals

**Research:** Tax policy; venture capital; and private equity

**Representative**

**publications:** "Regulatory Arbitrage,"

*Texas Law Review* (forthcoming, 2010); "A Theory of Taxing Sovereign Wealth," *NYU Law Review* (2009); "Two and Twenty: Taxing Partnership Profits in Private Equity Funds," *NYU Law Review* (2008); "Taxing Blackstone," *Tax Law Review* (2008)

**Education:** J.D., Columbia Law School

**Clerkships:** Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit; Judge M. Blane Michael of the U.S. Court of Appeals for the Fourth Circuit

## JAMES FORMAN JR.

Professor of Law, Georgetown University Law Center



**When:** Fall 2010

**Courses:** Juvenile Defender Clinic; Juvenile Defender Clinic Seminar

**Research:** Civil rights and criminal justice

**Representative publications:** "Why Care About Mass Incarceration?" *Michigan Law Review* (2010); "The Rise and Fall of School Vouchers: A Story of Religion, Race and Politics," *UCLA Law Review* (2007); "Community Policing and Youth

Assets," *Journal of Criminal Law and Criminology* (2004)

**Education:** J.D., Yale Law School

**Clerkships:** Justice Sandra Day O'Connor of the U.S. Supreme Court; Judge William Norris of the U.S. Court of Appeals for the Ninth Circuit

**Related experience:** Co-founder, Maya Angelou Public Charter School, Washington D.C.; Public Defender Service for the District of Columbia

## SALLY KATZEN

Senior Advisor, Podesta Group



**When:** Spring 2011

**Course:** How

Washington Really Works Seminar

**Representative**

**publications:** Co-author, "Office of Management and Budget: Ensuring

Fiscal Responsibility and Government Accountability," in *Change for America: A Progressive Blueprint for the 44th President* (2009); co-author, "Letting Government Agencies Do What They Were Created To Do," *American Constitution Society Issue Brief* (2008); "A Reality Check on an Empirical Study: Comments on 'Inside the Administrative State,'" *Michigan Law Review* (2007)

**Education:** J.D., University of Michigan Law School

**Clerkship:** Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit

**Related experience:** Deputy Director for Management, Office of Management and Budget (1999-2001); Deputy Director of the National Economic Council, White House (1998-1999); Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (1993-1998); Agency Review Working Group, Obama-Biden Transition; Partner, Wilmer, Cutler & Pickering, Washington, D.C.

## DOUGLAS KYSAR

Joseph M. Field '55 Professor of Law, Yale Law School



**When:** Spring 2011

**Course:** Torts

**Research:** Torts; environmental law; risk regulation; products liability

**Representative publications:** *Regulating*

*from Nowhere: Environmental Law and the Search for Objectivity* (2010); co-editor,

*Economics of Environmental Law* (2009); co-author, *The Torts Process* (seventh edition, 2007)

**Education:** J.D., Harvard Law School

**Clerkship:** Chief Judge William G. Young of the U.S. District Court for the District of Massachusetts

#### MAXIMO LANGER

Professor of Law, University of California, Los Angeles School of Law



**When:** 2010-11

**Courses:** Criminal Law; Global Perspective on Criminal Procedure; International Criminal Law

**Research:** Criminal law and procedure; comparative and

international criminal law; Latin American law; globalization of law

**Representative publications:** "Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery," *American Journal of Comparative Law* (2007); "The Rise of Managerial Judging in International Criminal Law," *American Journal of Comparative Law* (2005); "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," *Harvard International Law Journal* (2004)

**Education:** LL.B., University of Buenos Aires Law School; S.J.D., Harvard Law School

**Clerkships:** Public Defender Service, Washington, D.C.; Federal District Court No 2, Buenos Aires

#### DOTAN OLIAR

Associate Professor, University of Virginia School of Law



**When:** 2010-11

**Courses:** Copyright Law; Survey of Intellectual Property; Intellectual Property Theory Seminar

**Research:** Intellectual property;

property; cyberlaw; economics

**Representative publications:** "The (Constitutional) Convention on IP: A New Reading," *UCLA Law Review* (2009); co-author, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy," *Virginia Law Review* (2008); "Making Sense of the Intellectual Property

Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power," *Georgetown Law Journal* (2006)

**Education:** LL.B., Tel-Aviv University; S.J.D. and LL.M., Harvard Law School

**Clerkship:** Justice Jacob Kedmi of the Supreme Court of Israel

#### ADAM SAMAHA

Professor of Law, University of Chicago Law School



Law School

**When:** Fall 2010

**Courses:** Second Amendment; Religion and the Constitution

**Research:** Constitutional law; constitutional theory;

courts and society

**Representative publications:** "On Law's Tiebreakers," *University of Chicago Law Review* (forthcoming 2010); "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* (2008); "Undue Process," *Stanford Law Review* (2006)

**Education:** J.D., Harvard Law School

**Clerkships:** Justice John Paul Stevens of the U. S. Supreme Court; Chief Justice Alexander M. Keith of the Minnesota Supreme Court

#### AMANDA TYLER

Associate Professor of Law, George Washington University School of Law



**When:** Spring 2011

**Course:** Federal Courts and the Federal System

**Research:** Federal court system; the Supreme Court system; Suspension Clause; habeas corpus; stat-

utory interpretation; civil procedure

**Representative publications:** "The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts," *Federal Courts Stories* (2009); "Suspension as an Emergency Power," *Yale Law Journal* (2009); "Is Suspension a Political Question?" *Stanford Law Review* (2006)

**Education:** J.D., Harvard Law School

**Clerkships:** Justice Ruth Bader Ginsburg of the U.S. Supreme Court; Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit

## Faculty in Residence

#### BERNARD GROFMAN

Jack W. Peltason (Bren Foundation) Endowed Chair and Professor of Political Science; Adjunct Professor of Economics; Director, Center for the Study of Democracy; University of California, Irvine



**When:** Fall 2010

**Research:** Law and social science with a focus on representation, electoral system design, and voting rights; public choice; behavioral social choice

**Representative publications:** Co-author, *Behavioral Social Choice* (2006); co-author, *A Unified Theory of Party Competition* (2005); co-author, *Minority Representation and the Quest for Voting Equality* (1992)

**Education:** Ph.D. in political science, University of Chicago

#### MIRANDA PERRY FLEISCHER (LL.M. '03)

Associate Professor, University of Colorado Law School



**When:** Fall 2010

**Research:** The interaction of tax policy, charitable giving, and distributive justice

**Representative publications:** "Theorizing the Charitable Tax

Subsidies: The Role of Distributive Justice," *Washington University Law Review* (2010); "Generous to a Fault? Fair Shares and Charitable Giving," *Minnesota Law Review* (2008); "Charitable Contributions in an Ideal Estate Tax," *Tax Law Review* (2007)

**Education:** J.D., University of Chicago Law School; LL.M., NYU School of Law

**Clerkship:** Judge Morris Sheppard Arnold of the U.S. Court of Appeals for the Eighth Circuit

#### DON HERZOG

Edson R. Sunderland Professor of Law, University of Michigan Law School



**When:** Spring 2011

**Research:** Political theory

**Representative publications:**

*Cunning* (2006);

"The Kerr Principle,

State Action, and Legal Rights," *Michigan*



*Law Review* (2006); "Externalities and Other Parasites," *University of Chicago Law Review* (2000); *Poisoning the Minds of the Lower Orders* (1998); *Happy Slaves: A Critique of Consent Theory* (1989); *Without Foundations: Justification in Political Theory* (1985)

**Education:** Ph.D. in government, Harvard University

#### DAVID LAW

Professor of Law and Professor of Political Science, Washington University in St. Louis



**When:** 2010-11

**Research:** Constitutional politics and the globalization of constitutional law

**Representative publications:** "How to Rig the Federal

Courts," *Georgetown Law Journal* (forthcoming, 2011); "The Anatomy of a Conservative Court: Judicial Review in Japan," *Texas Law Review* (2009); "A Theory of Judicial Power and Judicial Review," *Georgetown Law Journal* (2009)

**Education:** J.D., Harvard Law School; B.C.L. in European and comparative law, University of Oxford and Magdalen College; Ph.D. in political science, Stanford University

#### JOHN MONAHAN

John S. Shannon Distinguished Professor of Law, University of Virginia



**When:** Fall 2010

**Research:** Law and psychology; public law; legal theory

**Representative publications:** "Beyond Context: Social Facts as Case-Specific Evidence," *Emory Law*

*Journal* (forthcoming, 2010); co-author, "Cultural Cognition and Public Policy: The Case of Outpatient Commitment Laws," *Law and Human Behavior* (2010); "Contextual Evidence of Gender Discrimination: The Ascendancy of Social Frameworks," *Virginia Law Review* (2008)

**Education:** Ph.D. in clinical psychology, Indiana University

**Related experience:** Research Consultant in the case of *United States v. John W. Hinckley, Jr.*, U.S. Attorney's Office for the District of Columbia

#### DAVID SHAPIRO

William Nelson Cromwell Professor of Law Emeritus, Harvard Law School



**When:** Spring 2011

**Research:** Civil procedure; federal system; legal profession; statutory interpretation

**Representative publications:** "The Story of Lincoln

Mills: Jurisdiction and the Source of Law," *Federal Courts Stories* (2009); "The Role of Precedent in Constitutional Adjudication: An Introspection," *Texas Law Review* (2008); *Federalism: A Dialogue* (1995)  
**Education:** LL.B., Harvard Law School  
**Clerkship:** Justice John M. Harlan of the U.S. Supreme Court

#### PABLO SPILLER

Jeffrey A. Jacobs Distinguished Professor of Business & Technology, University of California Walter A. Haas School of Business



**When:** 2010-11

**Research:** Transaction cost regulation; public contracting and regulation; comparative analy-

sis of institutions; positive political theory and the courts; antitrust

**Representative publications:** Co-editor, *Policymaking in Latin America: How Politics Shapes Policies* (2008); co-author, *The Institutional Foundations of Public Policy: The Case of Argentina* (2007); co-author, *Institutions, Contracts and Regulation in Argentina* (2000)

**Education:** Ph.D. in economics, University of Chicago; M.A. in economics, Hebrew University of Jerusalem

#### LEA VANDERVELDE

Josephine R. Witte Professor of Law, University of Iowa College of Law



**When:** Spring 2011

**Research:** Labor and property

**Representative publications:** Mrs. Dred Scott: A Life on Slavery's Frontier (2009); "The Thirteenth Amendment

of Our Aspirations," *Toledo Law Review* (2007); "The Role of Captives in the Rule of Capture," *Environmental Law* (2005)

**Education:** J.D., University of Wisconsin Law School

**Clerkship:** Judge Harold D. Vietor of the U.S. District Court for the Southern District of Iowa

## Multi-Year Visiting Faculty

#### CHARLES CAMERON

Professor of Politics and Public Affairs,



Princeton University

**When:** Spring 2011

**Course:** Political Environment of the Law Seminar

**Research:** Political institutions and policy making

**Representative**

**publications:** Co-author, "Strategic Defiance and Compliance in the U.S. Court of Appeals," *American Journal of Political Science* (2010); "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)

**Education:** Ph.D. in public affairs, Princeton University

#### DANIEL RUBINFELD

Robert L. Bridges Professor of Law



and Economics, University of California, Berkeley

**When:** Fall 2010

**Courses:** Antitrust Law and Economics; Quantitative Methods

**Research:** Antitrust;

economics of litigation; federalism

**Representative publications:** "Economic Issues in Antitrust Analysis,"

*Journal of Institutional and Theoretical Economics* (2010); co-author, "Empirical Study of the Civil Justice System," *Handbook of Law and Economics* (Volume 1, 2007); co-author, *Econometric Models and Forecasts* (2002)

**Education:** Ph.D. in economics, Massachusetts Institute of Technology

**Related experience:** Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

## PETER SCHUCK (LL.M. '66)

Simeon E. Baldwin Professor Emeritus of Law and Professor (Adjunct) of Law, Yale Law School



**When:** Spring 2011

**Courses:** Advanced Torts; Groups, Diversity and the Law Seminar

**Research:** Torts; immigration, citizenship and refugee

law; social management of diversity; administrative law

**Representative publications:** Co-author, *Targeting in Social Programs: Avoiding Bad Bets, Removing Bad Apples* (2006); *Meditations of a Militant Moderate: Cool Views on Hot Topics* (2006); co-editor, *Immigration Stories* (2005); *Foundations of Administrative Law* (2004)

**Education:** J.D., Harvard Law School; LL.M., NYU School of Law; M.A. in government, Harvard University

**Related experience:** Deputy Assistant Secretary for Planning and Evaluation, U.S. Department of Health, Education and Welfare

## GEOFFREY STONE

Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School



**When:** Fall 2010

**Courses:** Constitutional Decision-Making Seminar; First Amendment Rights of Expression and Association

**Research:** Constitutional law

**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)

**Awards:** Robert F. Kennedy Book Award and *Los Angeles Times* Book Prize for *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004)

**Education:** J.D., University of Chicago Law School

**Clerkships:** Justice William J. Brennan Jr. of the U.S. Supreme Court; Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit

## Senior Golieb Fellow

### SIR JOHN BAKER

Downing Professor of the Laws,



Cambridge University, England

**When:** Fall 2010

**Course:** English Legal History

**Research:** English legal history, especially the early-modern period;

early history of the inns of court; legal manuscripts

**Representative publications:** *Baker and Milsom's Sources of English Legal History* (second edition, 2010); editor, *Oxford History of the Laws of England, Vol. VI* (2003); *An Introduction to Legal History* (fourth edition, 2002)

**Education:** LL.B. and Ph.D., University College of London

**Related experience:** Literary Director of the Selden Society

## Senior Fellow

### ANNE MILGRAM '96

**When:** 2010-11

**Course:** Human Trafficking Seminar

**Education:** J.D., New York University;



M.A. in social and political theory, University of Cambridge

**Clerkship:** Judge Anne E. Thompson of the U.S. District Court for the District of New Jersey

**Related experience:**

Attorney General for the State of New Jersey; Federal Prosecutor, Criminal Section, Civil Rights Division, U.S. Department of Justice; Assistant District Attorney, Manhattan District Attorney's Office

## Hauser Global Visiting Professors

### EYAL BENVENISTI

Anny and Paul Yanowicz Professor of Human Rights, Tel Aviv University

**When:** Fall 2010

**Courses:** Humanitarian Law of Armed Conflicts; Law and Global Governance

**Research:** Constitutional law; international law; human rights and administrative law

**Representative publications:** *The International Law of Occupation* (second edition, forthcoming, 2010); "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts," *American Journal of International Law* (2008); co-author, "The Empire's New Clothes: Political



Economy and the Fragmentation of International Law," *Stanford Law Review* (2007)

**Education:** LL.B., Hebrew University of Jerusalem; LL.M. and J.S.D., Yale Law School

**Clerkship:** Justice M. Ben-Porat of the Supreme Court of Israel

### SABINO CASSESE

Justice of the Italian Constitutional Court



**When:** Fall 2010

**Course:** Law and Global Governance

**Representative publications:** "Private Participation in Public Decisions: Essay in Comparative Law," *Quarterly Journal of*

*Public Law* (2007); *Beyond the State* (2006); "The Globalization of Law," *Journal of International Law and Politics* (2005)

**Education:** J.D., University of Pisa

### CATHERINE KESSEDJIAN

Deputy Director of the European College of Paris; Professor of Law,



University Panthéon-Assas Paris II

**When:** Spring 2011

**Courses:** Rule Making Process in a Global World; International Commercial Transactions

**Representative**

**publications:** Co-editor, *Le Droit Européen et l'Investissement* (2009); "Le Règlement 44/2001 et l'Arbitrage," *Revue de l'Arbitrage* (2009); "Uniformity v. Diversity in Law in a Global World," *Revue Hellénique de Droit International* (2009)

**Education:** LL.M., University of Pennsylvania Law School; Ph.D., University of Paris

**Related experience:** Deputy Secretary General of the Hague Conference on Private International Law

**Awards:** Chevalier de la Légion d'Honneur (France)



**JÁNOS KIS**

University Professor of Philosophy and Political Science, Central European University  
**When:** Fall 2010  
**Courses:** Colloquium on Law, Economics, and Politics; Introduction to Political Philosophy



**Research:** Distributive justice; democratic theory

**Representative publications:** *Politics as a Moral Problem* (2009); "Constitutional Precommitment Revised," *Journal of Social Philosophy* (2009); "Popular Sovereignty," *Fundamentum* (2006)  
**Education:** Diploma in philosophy, Eötvös Loránd University, Budapest  
**Related experience:** Co-founder and chairman, Alliance of Free Democrats (Hungarian Liberal Party)

**MARTTI KOSKENNIEMI**

Academy Professor, University of Helsinki, Finland; Director, Erik Castrén Institute of



International Laws and Human Rights  
**When:** Fall 2010  
**Course:** Intellectual History of International Law  
**Research:** History of international legal thought

**Representative publications:** *La Politique de Droit International* (2007); *From Apology to Utopia: The Structure of International Legal Argument* (2005); *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001)  
**Education:** LL.M., LL.B., and Doctor of Laws, University of Turku, Finland; Diploma in Law, University of Oxford  
**Related experience:** U.N. International Law Commission; Counsellor and Attaché to the First Secretary, Ministry of Foreign Affairs of Finland; Justice, Administrative Tribunal of the Asian Development Bank

**MICHAEL LANG**

Professor of Tax Law, Vienna University of Economics and Business Administration  
**When:** Spring 2011  
**Courses:** EU Tax Law; Tax Treaties  
**Research:** International tax law; tax treaties; European tax law



**Representative publications:** "Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions," *EC Tax Review* (2009); *The Application of the OECD Model Tax Convention to Partnerships: A Critical Analysis of the Report prepared by the OECD Committee on Fiscal Affairs* (2000)  
**Education:** Ph.D. in law and Mag.iur in economics and business administration, University of Vienna  
**Related experience:** Partner, Deloitte Austria

**ARIEL PORAT**

Former Dean and Alain Póher Professor of Law, Tel Aviv University  
**When:** Fall 2010  
**Course:** Tort Theory  
**Research:** Torts; contracts; remedies; economic analysis of law  
**Representative publications:** "Private Production of Public Goods: Liability for Unrequested Benefit," *Michigan Law Review* (2009); co-author, "Total Liability for Excessive Harm" *Journal of Legal Studies* (2007); co-author, *Tort Liability under Uncertainty* (2001)  
**Education:** LL.B., LL.M., and J.S.D., Tel Aviv University

**WOLFGANG SCHÖN**

Director, Max Planck Institute for Intellectual Property, Competition and Tax Law, Germany; Vice-President, Max Planck Society, Germany  
**When:** Spring 2011  
**Course:** European and Comparative Corporate Law  
**Research:** Civil, commercial, and corporate law; accounting law; tax law



**Representative publications:** "Corporate Disclosure in a Competitive Environment: The Quest for a European Framework on Mandatory Disclosure," *Journal of Corporate Law Studies* (2006); "The Mobility of Companies in Europe and the Organizational Freedom of Company Founders," *European Company and Financial Law Review* (2006); "Playing Different Games: Regulatory Competition in Tax and Corporate Law Compared," *Common Market Law Review* (2005)  
**Education:** Ph.D., University of Bonn, Germany

**JANINE UBINK**

Senior Lecturer, Van Vollenhoven Institute for Law, Governance and Development, Leida Law School, Netherlands  
**When:** Fall 2010  
**Course:** Law and Governance in Africa



**Research:** Legal anthropology; land law; customary law; traditional authorities; gender; legal empowerment; rule of law, with a focus on Africa

**Representative publications:** "Negotiated or Negated? The Rhetoric and Reality of Customary Tenure in an Ashanti Village in Ghana," *Africa* (2008); co-author, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana," *Land Use Policy* (2008); "Customary Tenure Security: Wishful Policy Thinking or Reality? A Case from Peri-Urban Ghana," *Journal of African Law* (2007)  
**Education:** Ph.D. in international law, Leiden University, Netherlands  
**Related experience:** Executive Secretary, Commission on Legal Pluralism; Advisor, Dutch Ministry of Foreign Affairs

**BENJAMIN VAN ROOIJ**

Professor of Chinese Law and Regulation, Amsterdam Law School; Director, Netherlands China Law Center  
**When:** Fall 2010  
**Courses:** Enforcing Regulation for Emerging Markets Seminar; Law & Society in China: Access to Justice



**Research:** Compliance; law and development; land management and zoning; pollution regulation; occupational health; food and drug safety

**Representative publications:** "Pollution Law Enforcement in Emerging Markets (Journal Special Edition)," *Law & Policy* (2010); co-author, *Lawmaking for Development, Explorations into the Theory and Practice of International Legislative Projects* (2008); *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement; Theory and Cases* (2006)  
**Education:** Ph.D., Leiden University, Netherlands

## VINCENZO VARANO

Director, Ph.D. Program in Comparative Law and Professor of Law, University of Florence, Italy  
**When:** Spring 2011  
**Courses:** Comparative Civil Procedure; Comparative Law  
**Research:** Comparative methodology

and comparative civil procedure  
**Representative publications:** Co-author, *Civil Litigation in Comparative Context* (2007); co-author, *La Traduzione Giuridica Occidentale* (fourth edition forthcoming, 2010); co-editor, *L'Altra Giustizia: I Metodi Alternativi di Soluzione delle Controversie nel Diritto Comparato* (2007); co-editor, *The Reforms of Civil Procedure in Comparative Perspective* (2005)

**Education:** J.D., University of Florence School of Law; J.S.D., Stanford Law School  
**Related experience:** Former dean of the Faculty of Law, University of Florence

## Straus Fellows

### JEFFREY FAGAN

Professor of Law and Public Health, Director of the Center for Crime, Community and Law, Columbia University  
**Research:** Policing; capital punishment; juvenile justice; race  
**Representative publications:** "Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities," *Ohio State Journal of Criminal Law* (2008); co-author, "Legitimacy, Compliance and Cooperation: Procedural Justice and Citizen Ties to the Law," *Ohio State Journal of Criminal Law* (2008); "Juvenile Crime and Criminal Justice: Resolving Border Disputes," *Future of Children* (2008)

**Education:** Ph.D. in policy science and M.S. in human factors engineering, State University of New York at Buffalo

### DAVID A. GREEN

Assistant Professor of Sociology, John Jay College of Criminal Justice, City University of New York  
**Research:** The intersection of crime, media, public opinion, and policy  
**Representative publications:** "Feeding Wolves: Punitiveness and Culture,"



*European Journal of Criminology* (2009); *When Children Kill Children: Penal Populism and Political Culture* (2008); "Comparing Penal Cultures: Two Responses to Child-on-Child Homicide," *Crime and Justice* (2007)  
**Education:** Ph.D. in criminology and M.Phil. in criminological research, University of Cambridge

### LYNNE HANEY

Professor of Sociology, New York University  
**Research:** Global patterns in punishment; gender and punishment; penal politics in the United States and Eastern Europe  
**Representative**

**publications:** *Offending Women: Power, Punishment, and the Regulation of Desire* (2010); "Working Through Mass Incarceration: Gender and the Politics of Prison Labor from East to West," *Signs* (2010); *Inventing the Needy: Gender and the Politics of Welfare in Hungary* (2002)  
**Education:** Ph.D. in sociology, University of California, Berkeley

### DOUGLAS HUSAK

Professor of Philosophy and Law, Rutgers University  
**Research:** Criminal law and punishment; drug policy  
**Representative publications:** *The Philosophy of Criminal Law: Selected Essays* (2010); *Overcriminalization: The Limits of the Criminal Law* (2008); *Drugs and Rights* (1992)  
**Education:** J.D. and Ph.D., Ohio State University

### SUSANNE KRASMANN

Professor of Sociology, Institute for Criminological Research at the University of Hamburg  
**Research:** Governing security and transformations in the "rule of law"  
**Representative publications:** Co-editor,



*Governmentality: Current Issues and Future Challenges* (2010); co-editor, "Sichtbarkeitsregime. Überwachung, Sicherheit und Privatheit im 21. Jahrhundert," *Leviathan* (2010); "The Enemy on the Border. Critique of a programme for the preventative state," *Punishment & Society* (2007)  
**Education:** Diploma in sociology, University of Hamburg

**Related experience:** Member, Steering Committee of the German Society of Interdisciplinary Scientific Criminology

### JOHN PRATT

Professor of Criminology, Institute of Criminology, Victoria University of Wellington, New Zealand  
**Research:** Penal systems of Scandinavian and Anglophone societies  
**Representative publications:** *Penal Populism* (2007);

co-editor, *The New Punitiveness: Trends, Theories, Perspectives* (2005); co-editor, *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (2003); *Punishment and Civilization* (2002)

**Education:** LL.B. (Hon.), University of London; M.A., University of Keele, England; Ph.D., University of Sheffield, England



### MARTIN SCHAIN

Professor of Politics, New York University  
**Research:** Border control and immigration enforcement  
**Representative publications:** *The Politics of Immigration in France, Britain and the United States: A Comparative Study* (2008); co-editor, *The U.S. and E.U. in Comparative Perspective* (2006); co-editor, *Europe Without Borders* (2003)  
**Education:** Ph.D. in government, Cornell University



### SONJA SNACKEN

Professor of Criminology, Penology and Sociology of Law, Vrije Universiteit Brussel, Belgium  
**Research:** Sentencing and the implementation of custodial and non-custodial sentences in Belgium and Europe  
**Representative publications:** Co-author, *Principles of European Prison Law and Policy:*





*Penology and Human Rights* (2009); "Penal Policy and Practice in Belgium," in *Crime, Punishment and Politics in Comparative Perspective* (2007); "A Reductionist Penal

Policy and European Human Rights Standards," *European Journal of Criminal Policy and Research* (2006)

**Education:** Lic. Iur., Lic. Crim., and Ph.D. in criminology, Vrije Universiteit Brussel, Belgium

### MÁXIMO SOZZO

Professor of Sociology and Criminology, Universidad Nacional del Litoral, Argentina



**Research:** The metamorphoses of prisons in South America, connected with broader transformations of punishment  
**Representative**

**publications:** Co-editor, *The Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (2010); co-author, *Delito, Sensación de Inseguridad y Sistema Penal* (2010); editor, *Historias de la Cuestión Criminal en la Argentina* (2009)  
**Education:** J.D., Universidad Nacional del Litoral, Argentina

DAVID FRIEDMAN FELLOW

### FRANK ZIMRING

William G. Simon Professor of Law, University of California, Berkeley



**Research:** Crime and criminal justice policy  
**Representative publications:** *The City that Became Safe: New York and the Future of Crime Control* (forthcoming); co-author, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (2009); co-author, *Criminal Law and the Regulation of Vice* (2007); *The Great American Crime Decline* (2006)

**Education:** J.D., University of Chicago

**Education:** J.D., University of Chicago

## Straus and Emile Noël Joint Fellow

### JEAN-CLAUDE PIRIS

Legal Counsel and Director-General, European Council and EU Council



of Ministers  
**Research:** Institutional, political, and economic aspects of the European Union and European integration  
**Representative publications:** *The*

*Treaty of Lisbon: A Legal and Political Analysis* (2010); *The Constitution for Europe: A Legal Analysis* (2006)

**Education:** J.D., University of Paris

**Related experience:** French Conseiller D'Etat, United Nations; Director of Legal Affairs, Organisation for Economic Co-operation and Development

## Straus and Tikvah Joint Fellows

### GARY ANDERSON

Professor of the Hebrew Bible and the Old Testament, University of Notre Dame



**Research:** Almsgiving (tsedaqah) and acts of corporate charity (gemilut has-adim) in early Judaism and Christianity  
**Representative publications:** *Sin: A History* (2009);

*The Genesis of Perfection: Adam and Eve in Jewish Imagination* (2001)

**Education:** Ph.D. in Hebrew Bible/Old Testament, Harvard University

### MICHAEL WALZER

Professor Emeritus of Social Science, Institute for Advanced Study

**Research:** Comparative politics of political trials; the role of the state in international society  
**Representative publications:** *Just and Unjust Wars* (fourth edition, 2006); co-editor, *The Jewish Political Tradition* (2000); *Spheres of Justice* (1983); co-editor, *Dissent* (magazine)

**Education:** Ph.D., Harvard University



## Tikvah Fellows

BERKOWITZ FELLOW

### GABRIELLA BLUM

Assistant Professor of International Law and International Conflict Management,



Harvard Law School

**Research:** Theory of modern warfare

**Representative publications:** Co-author, *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism* (forth-

coming, 2010); "The Dispensable Lives of Soldiers," *Journal of Legal Analysis* (forthcoming, 2010); *Islands of Agreement: Managing Enduring Armed Rivalries* (2007)

**Education:** LL.B., Tel-Aviv University, Israel; LL.M. and S.J.D., Harvard Law School

**Related experience:** Strategic Advisor, Israeli National Security Council, Prime Minister's Office; Legal Advisor, International Law Department, Israel Defense Forces

### ELISHEVA CARLEBACH

Salo Baron Professor of Jewish History, Culture and Society, Columbia University

**Research:** Jewish communal governance



in the early modern period  
**Representative publications:** *Palaces of Time* (forthcoming, 2011); *Divided Souls: Converts from Judaism in Germany, 1500-1750* (2001);

*The Pursuit of Heresy* (1990)

**Education:** Ph.D. in Jewish history, Columbia University

### ROBERT CHAZAN

S. H. and Helen R. Scheuer Professor of Hebrew and Judaic Studies, New York



University  
**Research:** Jewish history from late antiquity to the end of the Middle Ages  
**Representative publications:** *Reassessing Jewish Life in Medieval Europe* (forthcoming, 2010); *The Jews of Medieval Western Christendom* (2006); *Fashioning Jewish Identity in Medieval Western Christendom* (2004)

**Education:** Ph.D., Columbia University; M.H.L., Jewish Theological Seminary

**Education:** Ph.D., Columbia University; M.H.L., Jewish Theological Seminary

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**Representative Publications:**

"Sources of Knowledge and Time

Oscillations: R' Yehuda Ha-Chassid's Will in the Modern Era," *Spiritual Authority: Struggles Over Cultural Power in Jewish Thought* (2009); "Deists, Sabbateans and Kabbalists in Prague, A Censored Sermon of R. Ezekiel Landau 1770," *Kabbalah: Journal for the Study of Jewish Mystical*

*Texts* (2009); "The Hatam Sofer: A Decisor in His Own Eyes," *Tarbitz* (2007)

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# Faculty Scholarship

## Against Moral Rights

**AMY ADLER** argues that laws protecting art draw a firm line between art and everyday objects that no longer exists.



**N**ORMALLY WHEN YOU BUY something, you can do what you want with it. If you buy a chair, a dress, or a car, you can alter it, embellish it, neglect it, abuse it, destroy it, or throw it away. But if you buy a work of art, your freedom to do what you want with it—your own property—is severely curtailed. This is because artists have powerful special rights, called “moral rights.” Moral rights allow an artist to control what you do with his work even after he has sold it and even if you are not in privity of contract with him. European in origin, moral rights have been part of U.S. federal law since the enactment of the Visual Artists Rights Act of 1990 (VARA), an amendment to the Copyright Act.

Moral rights scholarship is startling in its uniformity. Scholars take it as gospel that moral rights are crucial for art to flourish and that, if anything, we need a more robust moral rights doctrine. Commentators routinely lament the gap between our modest American moral rights laws and the more expansive European ones. In contrast to copyright law, which has produced a vibrant body of scholarship critical of the law’s excesses, the main scholarly criticism of moral rights is that they do not reach far enough. Wading through the largely repetitive law review literature, it doesn’t take long to get the implicit message: if you don’t support moral rights, you’re a philistine who doesn’t understand the sanctity of art.

This essay seeks to undermine the foundations of moral rights scholarship, law, and

theory. My argument is that moral rights laws endanger art in the name of protecting it. I focus on the moral right of “integrity,” called “the heart of the moral rights doctrine.” This right allows an artist to prevent modification and, in some cases, destruction of his artwork. As I show, the right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist. Ultimately, I question the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions from the normal rules of property and contract.

To put it mildly, this is not a popular argument. Indeed, it challenges the key assumptions of virtually all moral rights scholarship. But moral rights scholars have overlooked a surprising problem: the conception of “art” embedded in moral rights law has become obsolete. In fact, as I will show, moral rights are premised on the precise conception of “art” that artists have been rebelling against for the last 40 years. Moral rights law thus purports to protect art, but does so by enshrining a vision of art that is directly at odds with contemporary artistic practice. In this essay I ask: does moral rights law make sense in an era in which “art,” at least as we have known it for centuries, is over?

My goal is to provoke us to rethink our fundamental assumptions about moral rights law. Rather than offering a detailed proposal for legal reform, this essay attacks the foundations of the law. For this excerpt, I’ve chosen to focus on one of my arguments: that moral rights law obstructs rather than enables the creation of art. (In the unabridged version of my essay, I also dispute the pivotal assumption in moral rights law that an artist’s interests and the public’s interests in a work of art will converge. And ultimately, I attack the idea that visual art is an exalted and distinct category of property that deserves special legal treatment.)

### THE RATIONALES FOR MORAL RIGHTS

Moral rights were only recently and grudgingly accepted in the United States. The concept of moral rights originated in 19th-century France and has long been recognized by most civil law countries. Moral rights are a centerpiece of the international Berne Convention for the Protection of Literary and Artistic Works, which the United States resisted signing for years in part because of the moral rights provision in the Convention. In the interim, several states filled the gap; led in 1979 by California,

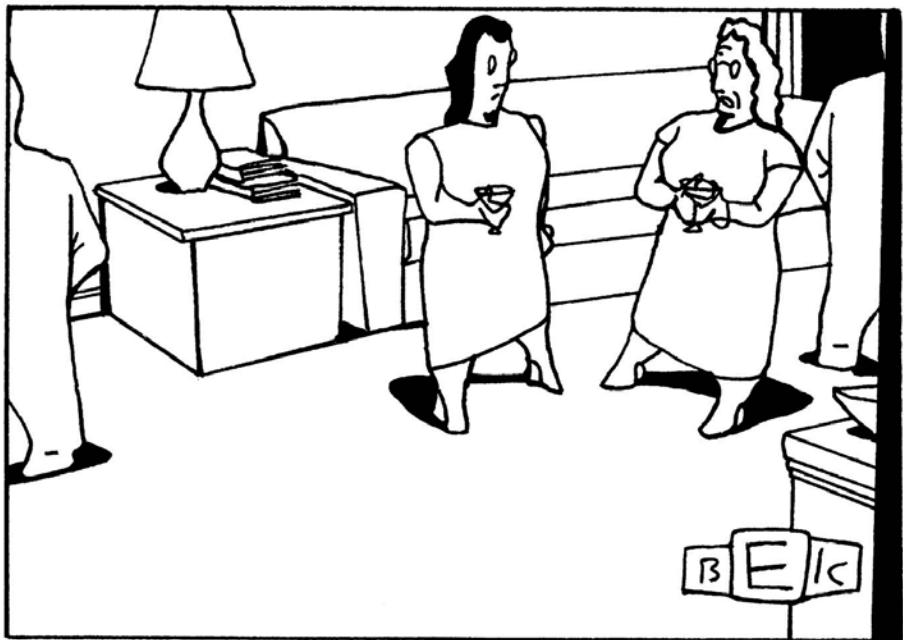
11 states enacted various forms of moral rights protections for visual artists. Eventually, in 1988, the United States ratified the Berne Convention. Two years later, Congress enacted VARA.

VARA grants three basic moral rights to artists who create “visual art,” a narrowly defined statutory category that includes unique paintings, drawings, some limited edition prints, sculptures, and photographs. The first and most important moral right is the right of “integrity” of the work of art, which grants an artist “the right... to prevent any intentional distortion, mutilation, or other modification of that work....” For works that are “of recognized stature,” VARA expands the right of integrity, allowing the artist to prevent not merely modification but outright destruction of the work. Aside from a few exceptions, VARA applies only to visual art created after June 1, 1991.

In contrast to Europe, where moral rights laws are far more extensive, the United States has never fully embraced moral rights. Critics lament that even within the limited class that VARA protects it is under-enforced; courts tend to read the statute narrowly. Because of this and other pressures, legal scholars have increasingly called for the expansion of U.S. moral rights.

Why do we wish to preserve the integrity of art? And why do we grant moral rights only to the rarified category of “visual art” and not to other objects? Embedded in moral rights law are two basic assumptions about visual art. First is that a work of art is an extension of the artist himself. Scholars invoke the metaphor of paternity to explain the artist’s profound connection with his work: he cares so deeply about the fate of his art because it is somehow his child and not just another object. Thus the artist feels personal anguish when someone else modifies his artwork/child. This is so even though the child has grown up and left home, and even though the artist/father has sold his child. The work of art is not just another product he has sold, but rather an “expression of his innermost being.” As the Second Circuit observed, moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work.”

Indeed, moral rights advocates sometimes speak of artworks as if they were living things: “To mistreat the work is to mistreat the artist.” It is as if the work has a magical connection to its maker; hurting the piece hurts the artist, as if you were sticking pins in a voodoo doll. Because of this emphasis on the artist’s (and indeed, the art’s) personhood, moral rights are said to have a “spiritual, non-economic and personal nature.”



*“I like his earlier work, particularly the ones I said I didn’t like at the time.”*

The second assumption embedded in moral rights law is that works of art deserve special treatment in the law because they are especially valuable and unlike other objects. As a prominent French legal decision explained, moral rights protect “the superior interests of human genius.” We must preserve a work as the artist intended it so that his genius can be “conveyed to posterity without damage.” Thus moral rights protect not only the individual artist; they also protect the public interest in preservation. Members of Congress repeatedly noted the dual purposes of VARA, to protect “not only...the artistic community, but also...the American public.” As John Henry Merryman, a great champion of moral rights law, has argued: “[T]here is more at stake than the concern of the artist.... There is also the interest of others in seeing...the work as the artist intended it, undistorted.... We yearn for the authentic, for contact with the work in its true version.” Thus, moral rights laws serve the public by preserving our shared cultural heritage, the best in our society and, by extension, in us.

#### **AGAINST INTEGRITY: THE VALUE OF MODIFYING AND DESTROYING ART**

*“Use a Rembrandt as an ironing board.”*

—Marcel Duchamp

Here I make a claim that many might find repugnant: that there is an artistic value in modifying, defacing, and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary art-making. As a result, moral rights law

endangers art in the name of protecting it. But is this danger at least justified by a countervailing benefit? I argue that moral rights law does less good than we might assume. This is because the urgency of preserving contemporary works of art—the only kind of work that VARA protects—has diminished in the wake of changes in contemporary culture.

Of course, there may be a non-artistic value in destroying or defacing works of art. The history of regime change attests to this. Often the first act of a new regime is to destroy the prior one’s artworks, particularly public monuments, to symbolize change. In revolutionary France, the painter Jacques-Louis David wrote: “Thus we shall pile up in Paris the effigies of the kings and their vile attributes to serve as the pedestal for the emblem of the French people.” Although there are compelling arguments in favor of preserving the remnants of an old regime, there is also a symbolic value to altering or destroying them, particularly when the fallen regime was repressive.

An analogous problem in this country is the question of whether to preserve racist historical monuments. For example, Professor Sanford Levinson describes the dilemma faced by New Orleans in deciding what to do with a 19th-century monument to racism. On the one hand, there is a public interest in destroying the monument to symbolically repudiate the racist past. Destroying it would also avoid the risk of spreading its hateful message or seeming to endorse it. Yet if we destroy the monument, we lose a chance to study it as history



or to be reminded of the continued need to fight racism. I submit that the best solution is one that draws on the principles of “creative destruction”: to “create” a new work by vandalizing the monument. Indeed, this is precisely what happened in 2004 when anti-racist vandals attacked the statue, defacing it with angry graffiti. Such mutilation preserves the memory of the past, but with a violent statement of repudiation, allowing both messages to coexist.

Moral rights law assumes that the “public interest” in a work of art is always uniform and readily discernible, and that it always favors preservation. But as this example shows, the public may vehemently disagree about whether to preserve a work; the public interest may also change over time. Amidst the uncertainty, one can argue that it is sometimes in the public interest to mutilate a work rather than preserve it.

More to the point, there are vital *artistic* interests, not merely social or political ones, in altering or even destroying unique works. Of course, it is easier to grasp the value of alteration or destruction when we think of changing *reproductions* of art rather than original, unique objects themselves. (One state’s moral rights law protects reproductions of artworks, not merely originals.) The copyright concept of fair use attempts to capture this interest in altering reproductions. Thus it is easy for law professors to describe dutifully the value of Duchamp’s drawing on a copy of the *Mona Lisa* in his famous *L.H.O.O.Q.* But it is one thing to draw on a *copy* of the *Mona Lisa* and quite another to draw on the *Mona Lisa* itself. That would be—perhaps—unbearable.

Yet there are numerous examples of important art that was created by modifying or destroying original works, not just copies. Consider Robert Rauschenberg’s *Erased De Kooning*. In 1953, Rauschenberg took a drawing by Willem de Kooning and spent a month erasing it. Rauschenberg exhibited the erasure as his own art. The Rauschenberg work depends on the fact that he violated not a reproduction of a work but an original, and not just any original, but an original by de Kooning. To grasp the radical quality of Rauschenberg’s work, one must remember the place of de Kooning in 1950s America. At that time, abstract expressionism so dominated American art that de Kooning and his compatriots had come to be viewed as heroic and almost godlike. In that climate, erasing a de Kooning drawing was a shocking, sacrilegious act. For the generation of artists after de Kooning, the question was how to make art in the wake of the godlike artists who came before them.

Rauschenberg’s answer was that new art might be about its own failure to achieve greatness, its impotent rebellion against the heroic past. Rauschenberg began to make art that, in the words of Douglas Crimp, was about “its own destruction.”

As I contend, destroying art can be a valuable way of making art. But I want to claim something more. Destruction is not simply an occasionally valuable thing, but rather a central quality of “art” itself. This is because of a surprising development within art history: “art” as a category has come to be about its own metaphorical destruction. If we accept this precept, then the physical destruction of works of art becomes a powerful expression of the metaphorical essence of art. In the following part of this excerpt, I introduce the argument that metaphorical destruction lies at the heart of contemporary art. For a deeper analysis of the place of destruction in contemporary art, and of the surprising importance of destruction throughout art history, please see the essay from which this is excerpted.

#### CONTEMPORARY ART AS THE DESTRUCTION OF “ART”

*“I want to assassinate painting.” —Joan Miró*

In 2006, a French performance artist used a hammer to attack the venerated 1917 sculpture *Fountain* by Marcel Duchamp. Duchamp’s most notorious work, *Fountain* was a “readymade” manufactured urinal that he elevated to the status of art. The French artist who attacked *Fountain*, Pierre Pinoncelli, claimed upon arrest that his vandalism was itself a work of art. He also claimed that the new artwork he made in his attack was in the spirit of Duchamp.

He was right on both counts. Crazy, but right. Like Rauschenberg, Pinoncelli made a new work of art by attacking an old one. But while Rauschenberg chose art that was romantic and heroic, Pinoncelli’s choice of target gave his creation a different meaning. By attacking a Duchamp, he was indeed working in that artist’s spirit. This spirit exposes something deeper about the centrality of destruction to contemporary art-making.

Consider the work that was the target of Pinoncelli’s attack. Duchamp’s intervention into artistic discourse—inserting a lowly, commercially manufactured urinal into gallery space and calling it art—was itself an act of metaphorical destruction, an assault on the sacred boundary between art and everyday objects, and ultimately, an attack on the category of “art” itself. Another work of Duchamp’s underscores the shocking violence of his stance. The work was an

injunction to the viewer: “Use a Rembrandt as an ironing board.” Duchamp’s oeuvre is aptly called “anti-art.”

Anti-art was not a passing creed. Although out of vogue for several decades, Duchamp’s work caught the attention of pop artists like Rauschenberg at mid-century. And since at least the 1980s, Duchamp has become transcendent in his influence. Renowned critic and philosopher Arthur Danto describes the contemporary art world as almost completely “defined by Duchamp as its generative thinker.” A recent poll of 500 art critics called Duchamp’s *Fountain* “the most influential work of modern art” by any artist. Contemporary artists have taken up his destructive spirit with a vengeance.

The interest in destruction is so pervasive in contemporary art that, in 2002, French critic Bruno Latour declared: “Art has become a synonym for the destruction of art.” In fact, the defining feature of contemporary art has been its attack on the coherence of “art” as a category. In this light, physical attacks against art objects can be understood as particularly valuable forms of expression. Moral rights law therefore rests on a vision of art at odds with contemporary art practice. The law obstructs rather than enables the creation of art.

Moral rights’ quest to preserve physical integrity overlooks the central role of metaphorical and, indeed, physical destruction in art. I do not claim, however, that destruction and mutilation are always valuable. In many cases, perhaps most, it may turn out that the original object was “better” than the subsequent one produced from its destruction. Furthermore, there is a long and sinister history of attacks on art, shown, for example, in the Taliban’s recent, tragic destruction of the Bamiyan Buddhas in Afghanistan or the hateful Nazi attacks on “degenerate art.” But this history is not the only one. At least when we are dealing with contemporary art, we should seek a deeper and more complicated understanding of integrity and destruction. We may be truer to the spirit of contemporary art if we start from the premise that it exists to be violated, reworked, and even destroyed rather than to be embalmed and preserved just as the artist intended.

#### THE DIMINISHED VALUE OF AUTHENTICITY AND PRESERVATION

*“Whatever art is, it is no longer something primarily to be looked at.” —Arthur Danto*

Have you ever seen the *Mona Lisa*? Isn’t it disappointing? There you are, seeking to be in the presence of greatness, and instead,

there are 50 people in your way, cameras whirring, and there's bulletproof glass blocking your view, and the picture itself is so surprisingly small. But perhaps the biggest letdown is that you've already seen the *Mona Lisa*, even if this is your first time in the Louvre. You've seen the *Mona Lisa* so many times that you can't even "see" the real one anymore. What do we hope for when we go to see it at the Louvre in the first place? What is this magic we seek in the presence of the painting? Perhaps we hope that the thing itself will exceed anything conveyed by its reproductions. Perhaps we hope that by being near the original object, we will be in the presence of Leonardo's genius. It is as if we seek some sort of grace. Walter Benjamin would say that we seek the painting's "aura."

Yet as Benjamin presciently saw, endless reproductions of unique works of art would ultimately destroy their aura. Writing in 1936, Benjamin could never have imagined how true his vision would become in our digital culture of endless copying. There is no more aura. We can't fully experience the magic of the *Mona Lisa* because it is gone; it is a casualty of the triumph of mechanical reproduction. And it is not only mechanical reproduction—with its relentless mediation of our vision—that has ushered in this loss. The loss might also come from the very act of honoring and revering the work. As noted above, one artist warned that when we turn a picture into a masterpiece, we render it "invisible in the present."

This reality has influenced my analysis of moral rights law. Moral rights law seeks to preserve unique objects, but these objects are already in some way lost. The desire to preserve the real thing made sense when moral rights were born in 19th-century France. As Merryman has argued, preserving works of art exactly as the artist intended them is crucial because "[we] yearn for the authentic, for contact with the work in its true version." But if we cannot see the "true" *Mona Lisa* anymore, the value of preserving the painting diminishes. At the same time, those very reproductions that destroyed the aura of the original have become rivals to the thing itself. To the extent that we want to preserve great works of art in order to protect our shared vocabulary—the primary rationale advanced in moral rights scholarship for the public interest in preservation—reproductions are no longer as paltry an alternative to the real thing as we might believe. Furthermore, since these reproductions are so widely available, and to the extent we cannot see the "real" *Mona Lisa*

anymore, the value of the original as opposed to the copy diminishes. Yes, I know that a digital reproduction can't convey lushness, texture, the true color of paint, the power of scale, and other unique aspects of a particular work. Of course, I recognize the limits of reproductions compared to the real thing. But we also must recognize the limits of the real thing in a world of reproductions.

There are further reasons why the concept of integrity in moral rights law seems less urgent to me than it might once have. This is because when dealing with contemporary artworks, we must consider the difference between what "art" means today and what it meant in the past. The word "art" used to invoke beauty, mastery, and transcendence. But postmodern art, drawing on Dada and Pop, moved art from the realm of the beautiful, physical, or even visual to the realm of the conceptual. Arthur Danto writes that in contemporary art, "visuality drops away, as little relevant to the essence of art as beauty proved to have been." Compare the experience of viewing a Duchamp urinal with the experience of viewing a Rembrandt painting. I am not saying that viewing the former is devoid of value (although Duchamp himself was dismayed when people evaluated *Fountain* aesthetically). But, in contrast to the Rembrandt, it is clear that a great deal of the value of the Duchamp is conveyed simply by describing it and how it was made (or not) by the artist: "Duchamp took a manufactured urinal and put it in a gallery space." Much contemporary art reflects this loss of interest in the object. Given this move of art from the physical to the conceptual realm, the value of preserving physical objects that artists make today is diminished.

Furthermore, moral rights' focus on preservation glosses over what a deeply unstable concept "preservation" is. Some critics and artists maintain that "preservation" of a work in a museum is itself a form of destruction. Adorno called museums "sepulchers"; Pissarro called them "necropolises." Some artists intend their work to age ungracefully, to show the vagaries of time. Brice Marden has directed preservationists not to repair accidental scuffs and other damage done to his monochromatic paintings. For other artists, part of the point of the work may be that it will fall apart. George Herms called his early assemblage works an "indictment of materialism"; preserving them might then be a contradiction.

Sculptor Eva Hesse did pioneering work in the 1960s in fragile, new materials such as

resin, latex, and fiber. Hesse died tragically young, in 1970. Some of her sculptures are disintegrating. Was it part of the art that the pieces would degrade? Or was it her intent to have them somehow preserved? Would preservation destroy her sculptures? Would we preserve them by letting them fall apart? The uncertainties surrounding Hesse's work raise questions that moral rights law glosses over: should the artist's wishes always determine the fate of the object? Does the work cease to be authentic if we "preserve" it by re-creating it, removing the trace of the artist's hand? Moral rights law enshrines a simplistic notion of integrity without recognizing the complexity of the concept.

## CONCLUSION

The reader may have noticed that this piece resembles the art I describe: an exercise in destruction. The main goal of this essay has been to undermine the foundations of moral rights law and scholarship. But what's left in the wake of my assault? Treating artworks like ordinary objects would solve some of the problems I describe, but it would also leave other problems unsolved and, in fact, create new ones. The most significant issue is this: problems will always arise from enshrining in law a particular, inevitably transitory, understanding of art. I am wary of blithely etching in stone a vision of art, reflecting the current moment, that is doomed to become as outmoded as the romantic vision that underlies moral rights now is. But who should make these decisions? And when should they be made? These are urgent yet extraordinarily difficult questions. Whether art is good or bad, valuable or not, varies greatly depending on whom you ask and when you ask. Although it's unlikely, it may turn out that future generations reject every "important" contemporary artist who would be entitled to VARA's protections. It wouldn't be the first time in the history of art that critics got it "wrong" or that an entire generation was completely written off. I want lawyers and legislators who draft moral rights laws to be sufficiently daunted by these problems. And although I do not purport to solve them, I do know at least this: contemporary art, to the extent that we care about it, is distinctly ill-served by the present moral rights regime. □

**AMY ADLER**, Emily Kempin Professor of Law, focuses her scholarship on art law, feminist theory, gender and sexuality, and free speech. This excerpt is from an article of the same title that appeared in the February 2009 issue of the California Law Review.



# The Detention of Civilians in Armed Conflict

**RYAN GOODMAN** finds that our nation's justifications for detention do not conform to international humanitarian law.



**I**N THE CONFLICT BETWEEN THE United States and Al Qaeda, the legality of the government's detention scheme has been mired in confusion. The lack of clarity is especially acute with respect to the substantive criteria for defining who may be detained. Assuming for present the purposes that the situation constitutes an armed conflict, a crucial determinant of the lawfulness of the detention scheme is whether international humanitarian law (IHL) permits the preventive detention of civilians, or particular groups of civilians. In addressing that issue, leading lawmakers, litigators, and adjudicators have misconstrued or misappropriated aspects of the IHL regime. Indeed, the confusion surrounding the future direction of U.S. detention policy stems in significant part from those misconceptions or misuses of the law.

First, policymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who directly participate in hostilities ("unlawful combatants") and civilians

who do not directly participate but nevertheless pose a security threat. Congress and the administration acted to detain the latter. They did so, however, by eschewing legal authority that clearly supports such detentions and by resorting, instead, to excessively broad definitions of combatancy to reach the same individuals. Second, opponents, in response, improperly disaggregated or omitted actors. That is, they criticized the government for expansive definitions of combatancy without acknowledging the existing legal authority to detain the same individuals regardless of nomenclature. And some opponents asserted there is no authority under IHL to detain civilians.

This essay is intended to shed greater light on the IHL regime that constitutes the legal background against which U.S. detention policies have been enacted and debated. Such an endeavor has special importance given the review of these issues by the Obama administration, Congress, and the federal courts. The central question is whether IHL prohibits the preventive detention of civilians who pose a

security threat on account of their direct or indirect participation in hostilities. I contend that a careful analysis of the IHL regime should distinguish four classes of actors and three coercive measures to restrain those actors. Mapping these distinct actors and measures helps to identify and correct existing category mistakes. Failure to do so—to appreciate and repair these persistent errors—threatens both humanitarian values and security interests in present and future conflicts.

## THE STRUCTURE OF INTERNATIONAL HUMANITARIAN LAW

One reason to examine the rules that apply in international conflict is their use as an analogy. More fundamentally, IHL in international conflict—and the Fourth Geneva Convention in particular—is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in noninternational armed conflicts. That is, IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices (e.g., targeting direct participants in hostilities) in a conflict between states, they *a fortiori* possess the authority to undertake those practices in noninternational conflict. Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain.

Turning to the general structure and composition of IHL, three coercive measures should be distinguished—targeting, detention, and trial. And four groups of individuals should be kept distinct—(A) regular armed forces and irregular armed forces that meet the criteria of the Third Geneva Convention or Additional Protocol I; (B) direct participants in hostilities; (C) civilians who are indirect participants in hostilities; and (D) civilians who are nonparticipants in hostilities. With respect to the relationships between these categories, the table on page 68 represents the international legal regime that long preexisted September 11, 2001.

A few explanatory notes deserve mention. First, the principle of distinction—a cornerstone of IHL—holds that parties to an armed conflict must distinguish between civilians and combatants in the use of military force. Civilians, however, lose their immunity from attack if they directly participate in hostilities (Group B).

By illegally taking up arms, they effectively become so-called “unlawful combatants” (a term now accepted even by leading experts at the International Committee of the Red Cross (ICRC)). Nevertheless, as a formal matter, Group B constitutes a subset of civilians, and they otherwise remain protected (e.g., by the Fourth Geneva Convention, Additional Protocol I, and Additional Protocol II).

Direct participation is generally defined by causal proximity to the damage inflicted on the enemy. According to the *Commentaries* on the Geneva Protocols published by the ICRC, “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place,” and it entails “a sufficient causal relationship between the act of participation and its immediate consequences.” Notwithstanding modest, if persistent, definitional squabbles, it is well settled that providing some important logistical support to armed forces, even in a zone of active military operations, falls below the threshold for direct participation. IHL specifies that persons accompanying armed forces, such as “supply contractors [and] members of labour units or of services responsible for the welfare of the armed forces,” are noncombatants, as are medical and religious personnel. According to a leading expert, also excluded in the case of conflicts involving irregularly constituted armed groups are “political and religious leaders... [and] financial contributors, informants, collaborators and other service providers without fighting function [who] may support or belong to an opposition movement or an insurgency as a whole, but can hardly be regarded as members of its ‘armed forces’ in the functional sense underlying IHL.”

With regard to detention, a fundamental distinction separates civilians in Group C (indirect participants in hostilities) and in Group D (nonparticipants in hostilities). The latter consists of individuals referred to, in some contexts, as “innocent civilians.” A settled principle of modern IHL forbids the detention of civilians solely because they are nationals or part of the general population of the enemy power. IHL requires a determination that each civilian who is detained poses a threat to security. Notably, the ICRC *Commentaries* accept that a security threat is defined more broadly than direct participation. Individuals may constitute a security threat because of (i) direct participation in hostilities or (ii) engagement in hostile action that falls short of

## COERCIVE MEASURES PERMITTED BY INTERNATIONAL LAW

SUBJECTS	I. Targeting	II. Military Trial	III. Detention
A. Regular armed forces/irregular forces meeting Geneva Convention III or Additional Protocol I criteria	Yes	Yes	Yes
B. Direct participants in hostilities (“unlawful combatants”)	Yes	Yes	Yes
C. Indirect participants in hostilities (imperative security threats)	No	No?	Yes
D. Nonparticipants in hostilities (“innocent civilians”)	No	No?	No

direct participation. I call the latter, residual category “indirect participants in hostilities.” And the Fourth Convention (under Articles 5, 27, 41–43 & 78) plainly permits their detention. International authorities have extended the same principle to non-international armed conflicts. And even international human rights law—which one might expect to apply a heightened level of rights protection—does not foreclose the preventive detention of civilians under certain circumstances. Indeed, the very first decision by the European Court of Human Rights upheld the preventive detention of individuals involved in terrorism.

For IHL purposes, an understanding of indirect participation can be derived in part from its comparison with direct participation and nonparticipation. In contrast with the former, indirect participation does not imply a direct causal relationship between an individual’s activity and damage inflicted on the enemy. And the activity need not occur on the battlefield. Indirect participation includes “[s]ubversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power” (quoting the ICRC *Commentaries*). The type of assistance may include logistical support provided to fighters. As a leading treatise on noninternational armed conflict explains, direct participation does not include “[c]ivilians who support the armed forces (or armed groups) by supplying labour, transporting supplies, serving as messengers or disseminating propaganda.” Notably, in current U.S. wars, private military contractors perform many of those functions, which the U.S. government emphatically contends fall short of direct participation.

With respect to a lower threshold, it is useful to distinguish indirect participation

from nonparticipation. Having political sympathy or affiliation with the enemy power is wholly insufficient to qualify as indirect participation. A paradigmatic case of indirect participation involves “actions which are of direct assistance” to the enemy. And although membership in an organization may be an important criterion, there are strong reasons to conclude that mere membership is insufficient. In an insightful analysis, the Supreme Court of Israel recently upheld a detention law but through a narrowing construction. The Court interpreted the statute to comply with principles derived from IHL: “[I]t is insufficient to show any tenuous connection with a terrorist organization”; instead, the detaining power must rely on the individual’s particular “connection and contribution to the organization...that are sufficient to include him in the cycle of hostilities in its broad sense.” Finally, individuals themselves must pose the threat to security. It would not constitute a valid security rationale, for example, to detain solely for intelligence-gathering purposes someone who has no meaningful connection to hostilities yet possesses information on enemy fighters.

Notably, column II of the table—the jurisdiction of military tribunals—is well settled for some groups but not completely settled for others. Emerging international standards generally appear to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals (yellow-shaded cells). Military trials might be permitted only when civilian courts are closed or unavailable—in circumstances such as occupation or martial law—such that resort to the military system is essentially “unavoidable” (to quote a leading U.N. human rights body).



## CONSEQUENCES OF OPPONENTS' POSITIONS

The positions taken by opponents of U.S. detention policy risk numerous negative effects and unexamined tradeoffs. One set of consequences results from the lack of legal support for some of their positions (e.g., the claim that IHL forbids the detention of civilians). Indeed, the framing of their claims may create the misimpression that a solid legal edifice supports their position. Accordingly, alternatives for developing principled

## Failure to distinguish classes of individuals and coercive measures to restrain them threatens both humanitarian values and security interests in present and future conflicts.

constraints on security detentions have received insufficient attention. More viable approaches may be in the political arena and through policy changes, not in courts and through litigation; or through litigation, but in constitutional law, not IHL directly.

Indeed, constitutional law might separate combatants (including “unlawful combatants”) from civilians with respect to classes of individuals who may be subject to military control. U.S. constitutional law could refer to IHL to define those group boundaries. For example, federal courts could require Congress to enact legislation explicitly subjecting “civilians” (e.g., indirect participants) to detention if Congress wishes to include such individuals. The government would have to hold its political feet to the fire—to issue a plain statement that it is invoking the authority to detain civilians who do not directly participate in hostilities—as a precondition to avail itself of such extraordinary power. But such a plain statement rule would derive from domestic law. The claim that IHL precludes the detention of civilians pursues the wrong line of argument.

The opponents arguably endanger other interests that they highly value. First, maintaining the position that detention is permissible only for direct participants (and members of armed forces) exerts pressure on U.S. authorities to develop expansive definitions of direct participation. As I

explain below, a broad definition of direct participation—or “combatancy”—leads to unintended consequences in the targeting context. Chief among them is that it may, in effect, expand the range of civilians who lose their immunity from attack.

Second, a narrow definition of direct participation may have rights-restricting effects in other areas of concern to opponents—such as the recruitment of child soldiers. Parties to a conflict are prohibited from using children to participate directly in hostilities. The narrower the general definition of direct participation, the wider the loophole in the child soldiers regime becomes.

Finally, the conflation of targeting and detention powers may result in self-fulfilling consequences in terms of who can be subject to lethal force. Opponents have suggested that if the government can detain particular civilians (indirect participants), it could also shoot them on sight. In other words, these opponents have asserted that detention and targeting authority are coextensive. If opponents lose their one claim (and indirect participants are thus subject to detention), they will have unintentionally lent support to the result that such individuals are now legitimate military targets. That outcome is a product of the logical structure of their argument. Of course, other institutional actors may work to counteract such a “logical” effect by drawing different lines. This essay provides guidance for the lines that should be drawn in accordance with IHL.

## CONSEQUENCES OF PROPONENTS' POSITIONS

Actors who have crafted and supported U.S. detention policies have employed justifications that can also produce unintended and undesirable consequences.

First, the government’s expansive definition of “unlawful combatants” may spill into the targeting domain. Such effects may be intended and welcomed in some quarters. Nevertheless, by officially designating indirect participants as “combatants,” the government now appears to license the targeting of a broad category of civilians who would otherwise be immune from attack. For example, are all “combatants” under the Military Commissions Act also legitimate military targets? Consider the implication of applying the Act’s broad definition to situations in which the U.S. is

the target of attack. Would not the faculty and students at U.S. military academies constitute legitimate military targets? Would private military contractors not lose their immunity from attack under the logic of the Act’s definition of combatants? As these examples indicate, the U.S. position introduces unnecessary and dangerous confusion into targeting law. Furthermore, a report by the well-respected U.N. special rapporteur on terrorism and human rights suggests that the U.S. targeting of terrorists exceeds the limits of direct participation. The government officially replied: “Narrowly focused military operations against *enemy combatants* are clearly consistent with the law of armed conflict.” That reply, however, is ambiguous and unconvincing in light of the government’s exorbitant definitions of combatancy.

Second, expansive notions of “combatancy” undermine counterterrorism efforts by cropping the definition of terrorism. Several international and domestic instruments define terrorism as violence committed against two groups: “noncombatants” and civilians who do not actively or directly participate in hostilities. The more narrowly the definitional boundary of those groups is drawn, the wider the range of actions that would not count as terrorism. Yet U.S. detention policy draws an exceptionally narrow boundary. If applied in the counterterrorism context, attacks on propagandists, financiers, and logistical workers would not technically be covered by the prohibition on terrorism. These results spell trouble for existing understandings of terrorism in the International Convention for the Suppression of the Financing of Terrorism; U.N. Security Council resolutions, and U.S. federal law for administrative agencies. It took years of diplomacy to secure those international agreements in particular. Eroding existing definitions of terrorism is thus especially deleterious at this juncture.

Third, expansive definitions of direct participation interfere with legal positions that the United States holds outside the targeting and terrorism contexts. For example, the government’s employment of private military contractors is premised on a narrow conception of direct participation. If these contractors were considered direct participants, the present U.S. force structure would be fundamentally illegal. Additionally, expansive definitions of direct participation complicate U.S. treaty commitments under the Protocol on children in armed conflict. In ratifying the Protocol, the United States submitted an “Understanding”

disfavoring a broad definition of direct participation to ensure that U.S. recruitment, training, and deployment practices do not run afoul of the treaty. That strategy, however, is inconsistent with U.S. definitions of direct participation that have been advanced in the conflict with Al Qaeda.

Finally, a classification of detainees that fails to differentiate direct and indirect participants may imperil the fair treatment of differently situated individuals in confinement. One problem is that civilians—regardless of whether they are direct or indirect participants—are potentially subject to military commissions. Once individuals are designated as an “enemy combatant,” per the Military Commission Act, the government can submit them to the military trial process. The U.N. counterterrorism rapporteur recently criticized this feature of the classification system with regard to military commissions, and the government’s reply was nonresponsive, stating: “The United States may not under our law try any civilian before a military commission. Rather, jurisdiction is limited to unlawful *enemy combatants*.” The U.S. definition of unlawful enemy combatants, however, clearly sweeps in civilians. The government’s reply thus begs the question of the legality of military trials.

## CONCLUSION

The detention of civilians in the conflict with Al Qaeda has sparked enormous controversy. The Obama administration will no doubt want to learn from these debates, and federal courts will surely confront these issues over time. In responding to the legal and policy challenges that have arisen following September 11, proponents and opponents of U.S. detention practices have veered far from the IHL regime. These distortions of IHL have led the nation down troubling paths. They sacrifice compliance with the international legal regime and they threaten humanitarian and security interests in present and future conflicts. At our current historical juncture, governmental institutions and civil society actors have a new opportunity to decide whether and how to align U.S. legal discourse and policy with the longstanding international legal framework. □

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# Domesticating Intelligence

**SAMUEL RASCOFF** proposes risk assessment as a model for thinking about and governing intelligence gathering in the U.S.



**O**N DECEMBER 16, 2005, A FRONT-page story in the *New York Times* described an intelligence program so sensitive that the newspaper’s editors delayed publication for over a year at the request of the White House. The program, which came to be known as the Terrorist Surveillance Program (TSP), involved extensive electronic surveillance inside the United States conducted by the National Security Agency (NSA). As the article put it, “The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the National Security Agency, whose mission is to spy on communications abroad.”

The precise contours of the TSP (and other programs like it, which together formed what has come to be known as the President’s Surveillance Program) are still largely unknown. What has emerged clearly, however, is that the program operated with almost no oversight. Lawyers, who as a matter of course should have been consulted on the legality of the program, were circumvented. (When concerns about the program’s legality led to more lawyers being informed about the program, more infirmities in its legal basis

were discovered, leading to threats of mass resignation and refusals to recertify the program.) The Foreign Intelligence Surveillance Court (FISC), which plays a critical role in ensuring compliance with the 1978 law designed to provide a check on domestic electronic spying, was kept out of the loop. Although the congressional intelligence leaders known as the “Gang of Eight” were briefed on the program, the secrecy surrounding it was so intense that the ranking Democrat on the Senate side was reduced to sending a handwritten letter to the vice president expressing his concerns, lest any of his staffers learn of the program’s existence.

Not only was oversight to ensure the TSP’s compliance with the law lacking, but so too was any meaningful review aimed at determining whether the program was effective and suggesting necessary improvements. Officials intimately involved in the creation of the TSP, such as then-NSA director Michael Hayden, have consistently insisted on the program’s utility. But a recently issued report reflecting the judgments of the inspectors general of multiple intelligence agencies is considerably more equivocal. The report notes that the very secrecy of the program tended to undermine its utility by curtailing the number of ana-



lysts who had access to information derived from the program. In the end, proponents of the plan were unable (or unwilling) to point to any specific “counterterrorism successes” brought about by the program.

The experience of the TSP is indicative of a larger problem for national security law and policy: the widening chasm between domestic intelligence practice and domestic intelligence governance. It is no secret that domestic intelligence is back with a vengeance. Whether employing electronic surveillance, human intelligence, data mining, or terrorism “watch-lists,” the government has significantly increased its domestic intelligence efforts as part of a broader counterterrorism strategy. In the wake of 9/11, new government agencies with domestic intelligence responsibilities have been created and others have been substantially retooled to focus on intelligence. State and local governments have also become heavily involved in domestic intelligence activities, either collaboratively with the federal government or independently.

The resurgence of domestic intelligence has not been accompanied by a corollary growth in intelligence governance, which has created a troubling chasm at the heart of domestic intelligence. The vacuum is, in fact, doubly troubling. First, and most obviously, the gap between intelligence practice and governance raises the specter of widespread abuse and diminishment in civil liberties. The history of domestic intelligence in America (and across the world) is replete with instances of the government invoking questionable ends to justify increasingly expansive—and legally problematic—intelligence practices. Indeed, the current vacuum can be seen as the latest development in a historical pattern aptly named the “boom-and-bust cycle” of intelligence governance, where the resurgence of interest in intelligence (motivated by concerns about a particular threat) has typically meant a relaxation of the rules restraining intelligence agencies. This relaxation of limits has, in turn, typically generated periods of abusive practices, followed by inquests and periods of tighter regulation.

The governance vacuum also carries a risk to security: without appropriately scaled and designed governance, intelligence is likely to become non-rigorous and ultimately ineffective at providing policymakers with the informational advantage they need to keep terrorist threats at bay. In other words, the current governance gap in domestic intelligence is a problem not only for people who worry about liberty, but also for those primarily concerned with security.

“Domesticating Intelligence” aims to show the way out of the current vacuum, and even out of the larger historical pattern of boom and bust. Taking as granted the fact that domestic intelligence is—for the foreseeable future, anyway—here to stay, it offers a new way to think about domestic intelligence governance and domestic intelligence itself. I argue that domestic intelligence is best thought of as a form of risk assessment—a familiar concept from regulatory policy and practice—and that the legal and institutional tools developed within the administrative state are necessary to create an effective and enduring intelligence governance framework. In particular, I contend that an expansive approach to cost-benefit analysis that I refer to as rationality review, judicial review, and public participation made possible by increased transparency ought to play a significant role in reconfiguring the governance of domestic intelligence. Regulatory governance implies more than a set of institutions and practices; it suggests the need to rethink the goal of intelligence governance. Specifically, I claim that domestic intelligence governance should aim to produce intelligence that is obtained in full compliance with the law, but also intelligence that is accurate, efficient, and useful to policymakers. By adopting a regulatory approach to intelligence governance, this article is instructive in how to avoid the unproductive and constricting debate in which counterterrorism implies either a thorough-going military or criminal approach. Against this backdrop, I argue that an overarching regulatory approach that draws on a range of legal tools and methodologies (including those with military or criminal law pedigrees) is truer to what counterterrorism requires.

### THE VACUUM IN INTELLIGENCE GOVERNANCE

The current vacuum has three main sources. The first is doctrinal: current law exempts numerous and increasingly relevant categories of intelligence gathering, such as human intelligence and data mining, from meaningful judicial scrutiny. More generally, the Supreme Court has continued to be unwilling to express a view about the status and permissible scope of intelligence under the Constitution. Second, there is an institutional component. Increasingly, important practitioners of contemporary domestic intelligence—including agencies formerly devoted exclusively to foreign intelligence matters, as well as local and state police—

function without meaningful oversight. At the same time, organizations that have been called on for a generation to provide governance of intelligence—such as the FISC and the congressional intelligence committees—are not well positioned to shoulder the burden of governing the newly ascendant domestic intelligence apparatus.

Third, and most centrally, the vacuum in intelligence governance has conceptual dimensions. The current patchwork of intelligence governance, which grew up in response to the abuses uncovered in the mid-1970s, continues to focus on the prevention of illegality and the politicization of intelligence. More fundamentally still, the current vacuum in intelligence governance is connected to a conceptual problem that has plagued domestic intelligence over the course of its century-old history in the United States: Just what sort of activity is domestic intelligence? At three different moments in the last century, American officials and commentators on domestic intelligence imported the tools and conceptual frameworks of criminal law to the universe of domestic intelligence.

The first dates back to the origins of the FBI in the early 20th century. In response to alleged intelligence abuses by the FBI during the “Red Scare,” then-Attorney General Harlan Fiske Stone implemented a form of the criminal standard in 1924, mandating that the FBI not be concerned with the opinions of individuals, political or otherwise, but “only with their conduct and then only with such conduct as is forbidden by the laws of the United States.” Gathering intelligence without an allegation of criminal activity would create an agency that was, to Stone, “dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.”

This so-called Stone Line did not last long, however. In the second salient moment—which was, in many respects, a reaction to the first—a young, ambitious FBI lawyer named J. Edgar Hoover, who began his career in the FBI’s intelligence service, was appointed FBI director in 1924 and rejected the Stone Line’s limitation of intelligence collection to criminal investigation. By the mid-1930s, when FDR was determined to have the FBI collect the intelligence necessary to understand the threat posed by communists and fascists, the criminal standard had been effectively abandoned. Thus, in 1941, Hoover was reminding Attorney General Robert Jackson of the difference between investigation and intelligence gathering, noting the importance of the latter to address the

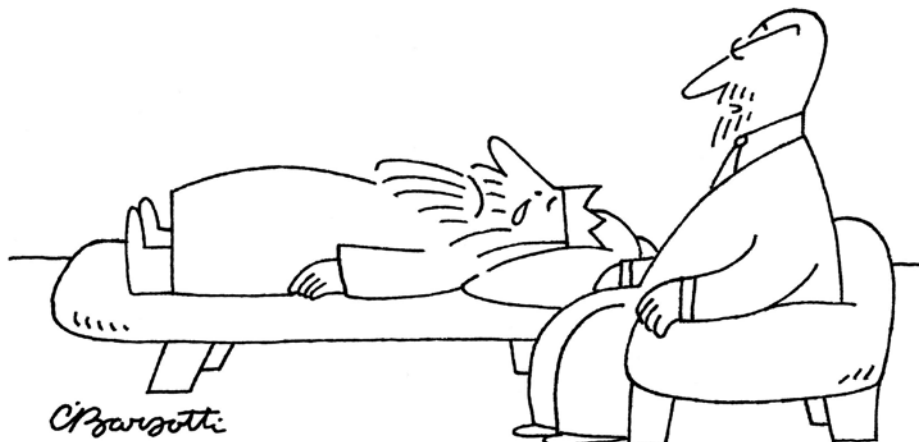
problem of subversive groups that “direct their attention to the dissemination of propaganda ... much of which is not a violation of a Federal Statute.”

The third decisive moment came during the 1970s, following the “fires of controversy created by Watergate, COINTELPRO, and the fifty-year litany of abuses meticulously documented in the Church Committee Report,” when two new governance regimes were ushered in, both tending to instantiate the criminal standard. First, there was FISA, which relied on a process similar to that employed for obtaining criminal wiretapping authority, thereby reinforcing the ways in which the criminal law shaped the governance of intelligence. Second, and less well known, was the promulgation of internal FBI guidelines requiring a showing of criminal predication before human intelligence gathering could commence. Attorney General Edward Levi issued the “Domestic Security Guidelines,” which required that domestic intelligence gathering take place only where criminal predication existed. While some argued that the Levi Guidelines did not go far enough to reinstate the criminal standard and protect civil liberties, the changes evidently brought about a fundamental reorientation of domestic intelligence away from “strategic intelligence” and toward case-specific information.

The reestablishment of the criminal standard meant that the FBI essentially got out of the business of gathering and analyzing broad-gauged strategic information against potential threats and assimilated its intelligence gathering to the methodology of criminal investigation. As an FBI official recently observed regarding intelligence practice under the criminal standard, to determine whether a regional FBI manager had a problem with terrorism or espionage in his area of responsibility, the relevant question would have been how many criminal cases he or she had open relative to the terrorist group or country in question. The “criminal standard” has given out under increased pressure from the post-9/11 counterterrorism imperative and, specifically, the need to design an intelligence regime equipped to anticipate and help prevent certain high-impact, low-probability events. Yet conceptually it continues to dominate thinking about domestic intelligence and its governance.

### INTELLIGENCE AS RISK ASSESSMENT

It has proven easier to criticize the suitability of the criminal standard than to find a new conceptual model to fit the emergent preventive regime. If domestic intelligence



*“Well, if you’re going to wiretap your people you are going to hear things.”*

does not amount to a form of criminal investigation, then what is it, and what is the nature of the power that the government exercises in this area? I argue that the post-9/11 domestic intelligence process is properly regarded as a form of risk assessment. Risk assessment is a methodology that, over the last quarter-century, has transformed the government’s approach to regulation by providing a framework for identifying public risks and prioritizing regulatory action. Stated at a high level of generality, domestic intelligence (no different from other forms of risk assessment) is simply a means by which the state generates information that will inform its decisionmaking about the health and safety of its citizens.

Domestic intelligence is best thought of as a form of risk assessment in three important ways. First, it is proactive—it seeks to acquire and make sense of information about a hazard before the underlying risk materializes. Second, it is aggregative, meaning that domestic intelligence seeks to acquire vast quantities of data from which to draw informed conclusions. Aggregation is evident in the mass acquisition and computer-driven analysis of telephonic communications, electronic mail, and business records, from which patterns of activity potentially suggesting a terrorist threat can be discerned. The aggregative tendency in intelligence collection and analysis is not, however, limited to electronic communications. It also finds expression in human intelligence, where a newfound focus on identifying social patterns (for example, concerning the “radicalization” of young Muslims) has led officials to collect and analyze intelligence relative to whole communities or neighborhoods in search of meaningful trends (as opposed to intelligence regarding specific individuals about whom officials had already nurtured suspicions). Third, and related, domestic

intelligence as risk assessment places a premium on the rigorous analysis of data. Intelligence analysis must be patterned on other types of scientific inquiry in which subject-matter experts test the validity of hypotheses in view of dynamic empirical data. Analysis of this sort—a key phase in the intelligence cycle—has historically received scant attention within the FBI.

### THE REGULATORY TURN IN INTELLIGENCE GOVERNANCE

If domestic intelligence is essentially a regulatory activity, it follows that regulatory law should supply the framework for thinking about its proper governance. “Domesticating Intelligence” sets out the basic shape of that framework, drawing on three mainstays of administrative law: rationality review, judicial review of agency action, and public participation underwritten by transparency. Through rationality review, the most important of the three, intelligence governance can address not only issues of economic efficiency and analytic soundness, but also the inevitable tradeoffs implicating basic legal and ethical norms. Because the rationality review I champion is not limited to the patchwork of legal doctrine that has grown up around intelligence, it carries the potential for providing more protection of basic rights than is currently available under the law. For example, rationality review could protect against excessive intelligence gathering through human sources, a practice that is left unregulated by current legal doctrine.

Additionally, judicial review plays an important role in ensuring that practitioners of domestic intelligence comply, over time, with their previously approved intelligence mandates. Judicial review of this kind—which resembles, in certain respects, traditional “hard look” review—simultaneously plays to judges’ core competencies and



addresses one of the key dangers endemic to intelligence activity: the insatiability of intelligence officials' appetite for information. Finally, public participation, made possible by greater transparency, promotes more reliable intelligence (which is less prone to the pathology of groupthink, for example), while at the same time helping to secure the legitimacy of the necessarily secretive intelligence apparatus.

Regulatory governance of domestic intelligence may strike some as farfetched; in fact, however, there have been subtle but important intimations of a regulatory turn in intelligence governance in recent years, which have created new opportunities for creative solutions. The rationality review that I champion should be performed by an organization within the Office of the Director of National Intelligence (ODNI), modeled on the Office of Information and Regulatory Policy (OIRA) within the Office of Management and Budget. Like OIRA, the office I envision would be tasked with considering costs and benefits (measured in terms of monetary costs as well as more qualitative effects on security and basic rights) of proposed domestic intelligence programs, and approving only those programs whose benefits outweigh their costs. Although such an office does not currently exist, the ODNI's organic statute clearly

countenances the sorts of analysis that it would perform. Indeed, the ODNI's *raison d'être* is to lead the intelligence community's efforts in budgeting, intelligence sharing, analysis, and the protection of civil liberties—precisely the sorts of issues central to effective rationality review of intelligence programs. I argue that by taking on responsibility for rationality review of domestic intelligence programs, the ODNI will be able to answer an open question concerning the office's proper role in relation to the intelligence community.

Next, I contend that the FISC ought to provide the sort of judicial review of agency action that I advocate, building on important transformations in that court's role brought about by the FISA Amendments Act of 2008. Finally, and somewhat more tentatively, I offer a thumbnail sketch of what a more transparent and pluralistic intelligence governance framework might look like in practice. In this regard it is potentially significant that in formulating the new Attorney General's Guidelines, FBI Director Mueller invited various advocacy groups (including the ACLU) to participate in the process and to comment on the proposal.

#### CONCLUSION

Thinking of domestic intelligence as a form of risk assessment and advocating for a

regulatory form of intelligence governance confers a number of benefits. At the conceptual level, these innovations make a significant contribution to solving a problem that has confounded policymakers and commentators for at least a generation: What kind of authority is being exercised when the government engages in domestic intelligence, and how should that authority be constituted and circumscribed? Second, it paves the way for renegotiating social attitudes toward intelligence. As with other powers wielded by the regulatory state, we ought to strive to make domestic intelligence simultaneously more effective and more honest. Third, and perhaps most significantly, discussion of domestic intelligence as a form of risk assessment and invocation of regulatory processes for governing it pave the way for reframing the national debate about the nature of counterterrorism since 9/11. In place of the familiar war and criminal law paradigms, this article helps show the way to a risk-management approach to counterterrorism. Counterterrorism is not a matter solely for criminal law enforcement, nor does it necessarily implicate the war powers of the president. Rather, counterterrorism is something different in kind—an approach to managing risk that, in concept, is closely related to other areas of regulatory endeavor.

When J. Edgar Hoover presided over the growth of domestic intelligence, his vision was to create a “bureau of intelligence,” with its connotation of a New Deal regulatory body steeped in science and expertise. But over time, insufficient oversight and rampant abuses within the intelligence apparatus caused domestic intelligence to lose its technocratic bearings, to the point that by the mid-1970s, criminal law appeared to be the most logical choice for a framework for analyzing and governing domestic intelligence. “Domesticating Intelligence” highlights the possibility of returning domestic intelligence to its regulatory origins and updating that vision to suit the temper of the times. In so doing, it paves the way for reconciling the two great administrative law developments of the last century: the emergence of the New Deal regulatory state and the growth of the Cold War national security apparatus. Domesticated intelligence lies at their intersection. □

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# Good Reads

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## The New Public International Law of Investment

BY JOSÉ ALVAREZ

Martinus Nijhoff, forthcoming, 2011

The role of U.S. government lawyers in, for example, authorizing the use of "enhanced interrogation techniques" in conducting the "war on terror" has focused attention on how international lawyers behave as professionals, particularly when they provide advice to sovereigns about whether to comply with international law. The investment regime, and particularly investor-state dispute settlement, raises unsettled (and unsettling) questions concerning the professional responsibilities of advocates and adjudicators who, while remaining subject to distinct national codes of conduct, engage with each other as advocates in a transnational setting.

Those who participate in international dispute settlement as judges or advocates, whether in the International Court of Justice or arbitration tribunals established within the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), tend to come from a relatively small group of repeat players. And yet, there is some question about whether even this group has a common understanding of, for example, the rules for preparing witnesses; for determining what is a conflict of interest among those who may be acting as scholars one day, arbitrators the next, and expert witnesses thereafter; or about what should remain confidential and unavailable for public scrutiny. It is not clear that arbitrators charged with settling investor-state claims have a common view of their own role; that is, whether they see themselves principally as agents for the disputing parties before them or more broadly as agents for a broader international community. There are also serious debates about whether there really are "common rules of international procedure" or of professional conduct that all international adjudicators have in common or whether this hybrid form of dispute settlement, involving non-state and state parties as litigants, pose special problems meriting unique solutions. There are also clear differences of view between those who think that we can trust the competitive market for international arbitrators, and for investor-state arbitrators in particular, to produce ethical outcomes and those who think more top-down regulation is required. These professional questions ... are now emerging as never before in the course of public debates about the legitimacy of the investment regime. Outcomes reached in the investment regime may well be of interest to other international regimes experiencing judicialization.

This book is a compilation of lectures delivered by Alvarez in 2009 at The Hague Academy of International Law.

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## Regoverning the Workplace

BY CYNTHIA ESTLUND  
Yale University Press, 2010



The law that governs work in the United States is not working. Most notoriously, it is not enabling workers to participate collectively in workplace governance, as the centerpiece of the New Deal labor reforms, the National Labor Relations Act (NLRA), was meant to do. It is not providing a firm and decent floor on labor standards, as another pillar of the New Deal, the Fair Labor Standards Act (FLSA), and subsequent labor standards were

meant to do. And it is not providing most workers with a practicable means of enforcing their legal rights to fair and equal treatment at work, as the 1964 Civil Rights Act and a steady stream of employee rights statutes and doctrines were meant to do....

What will it take to create an effective system of self-regulation in the workplace? In its particulars, the answer will vary from one legal regime to another and from one industry or firm to another. It will be different for employment discrimination laws than for workplace safety laws, and it will be different for a large corporation like Walmart than for a small janitorial contractor. One of the lessons of labor law's ossification is that any single system of workplace governance is likely to be, or to become, dysfunctional over time and across the range of workplaces and industries that are in need of better governance. Still, particular solutions should be informed by more general principles. In seeking those general principles, I turn first to the model of Responsive Regulation, championed especially by John Braithwaite. Braithwaite and others, drawing on a wealth of experience across an array of regulatory arenas, maintain that effective self-regulation must be tripartite in structure. It requires the participation of the regulated firm, the government, and the primary beneficiaries of the relevant legal norms, or "stakeholders." And whether the beneficiaries of the relevant legal norms are consumers, patients, shareholders, air breathers, or workers, they must be represented in some organized form that allows them to influence and monitor self-regulatory processes.



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## Torture, Terror, and Trade-Offs: Philosophy for the White House

BY JEREMY WALDRON

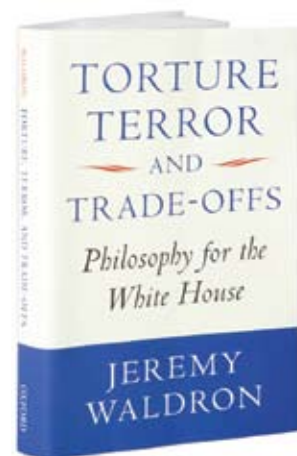
Oxford University Press, 2010

The morality of terrorism didn't change on September 11. The spectacle did and many more people thought more about terrorism after the 9/11 events or condemned it more vehemently. Some of this thinking meant that people became both more precise, but also at the margins less confident, about the exact meaning of 'terrorism' and its distinction from other military doctrines and other kinds of crime....

The laws relating to torture did not change after 9/11. Torture remained absolutely forbidden by international law (by treaties that the United States has signed and ratified) and domestic legislation (by a statute that Congress enacted in 1994). The legal prohibition on torture was then and is now unequivocal and unconditional: there is no provision in law for the occurrence of traumatic events like those of 9/11 (or the prospect of their repetition) to make a difference to the legal status of deliberately inflicting severe mental or physical pain in the course of interrogation.

In some bodies of human rights law, the prohibition on torture is made absolute in a very literal sense: the provision which permits some derogation from human rights in times of 'public emergency which threatens the life of the nation' is said explicitly not to apply under any circumstances to torture or the prohibition on inhuman and degrading treatment. In other bodies of law, such as the U.S. Anti-Torture statute, there is no such explicit doctrine, because there is no arrangement for derogation of any provisions; the absoluteness of the rule against torture is simply inferred directly from its categorical imposition. No provision is made by legislation for any emergency exception and speculative attempts to exploit the criminal law doctrines of justification or necessity—e.g. by officials in the Justice Department's Office of Legal Counsel—have usually met with skepticism from human rights lawyers. In the wake of 9/11, many of us assumed that the prohibitions on these practices would stand.

Not only was there no change in the unlawfulness of torture after 9/11, even in the face of what seemed like an enhanced prospect of more destructive terrorist attacks and a pressing need for information to pre-empt them, but I believe there was no change in its moral status either. Torture was and remains a moral as well as a legal abomination.





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# Student Scholarship

## When Wildlife Is Endangered Only Within Our Borders

*Allison Westfahl Kong's interest in environmental and property law was evident well before she came to NYU Law. As an undergraduate studying mathematics and government at Claremont McKenna College in California, Westfahl Kong was appointed by the Claremont City Council to the Community Services Commission, weighing in on policies concerning parks, community facilities, urban planning, and waste and recycling. She served as a commissioner for three years before graduating summa cum laude and Phi Beta Kappa in 2007, and as best overall student in both of her majors.*

*Westfahl Kong won the annual student writing competition of the New York State Bar Association's Committee on Animals and the Law for an earlier version of her note, "Improving the Protection of Species Endangered in the United States by Revising the Distinct Population Segment Policy," which was published by the New York University Law Review in April 2010 and is adapted below. She first became interested in the topic while taking Dean Richard Revesz's Environmental Law class, and subsequently worked as the dean's research assistant. Westfahl Kong currently clerks for Judge Jed Rakoff of the U.S. Court for the Southern District of New York, and will clerk for Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit in the 2011-12 term.*



ALLISON WESTFAHL KONG '10

and court decisions, the United States is not allowed to protect domestic populations of endangered species when the species is thriving elsewhere. Our government would idly stand by while we lost our nation's most iconic animal.

This scenario might seem far-fetched, but a parallel situation is now unfolding. When the National Marine Fisheries Service (NMFS) acted to protect an endangered population of the Cook Inlet beluga whale, the state of Alaska resolved to challenge the decision, arguing that the population is insufficiently "significant" to warrant protection. If courts agree, as is possible given current policies, Alaskans could be deprived of a beautiful marine species.

While Alaska may abandon this lawsuit, it demonstrates that FWS and NMFS now find it difficult to list U.S. populations of species as endangered when they are thriving outside our borders. In 2007, for instance, after some legal battles, FWS removed the Arizona pygmy-owl from the

endangered species list because the species is abundant in Mexico, even while the agency acknowledged that delisting could lead to the domestic extinction of the western pygmy-owl. Under current policy, American species are denied protection whenever they are not a significant portion of the species' global population. In my note I explore whether this policy should be revised to allow the listing of species that are endangered solely within the U.S.

### ENDANGERED SPECIES AND DISTINCT POPULATION SEGMENTS

In 1973, responding to unnatural rates of extinction among U.S. species due to economic development, Congress passed the ESA, our primary mechanism to identify and protect endangered and threatened species by requiring listing of these species and mandating protective actions. Two agencies implement most ESA provisions: FWS, responsible for terrestrial animals and plants, and NMFS, responsible for marine animals and plants.

The ESA defines "species" to include "any distinct population segment of any species of vertebrate fish or wildlife." Because "distinct population segment" is neither a scientific term nor itself defined in the ESA, controversy surrounded DPS listings after Congress added this language to the ESA in 1978. FWS and NMFS adopted the DPS Policy in 1996 to "clarify their interpretation of the phrase distinct population segment." Now, to qualify as a DPS, the population must be both discrete and significant. "Discreteness" ensures the population can "be adequately defined and described," while "significance" obliges the agency to "concentrate conservation efforts...on avoiding important losses of genetic diversity."

If the population is discrete, the agency determines its "significance" by considering four factors: 1. persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, 2. evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon, 3. evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or, 4. evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

While this policy endeavored to resolve ambiguities in the term "distinct population segment," it was doomed to provoke litigation due to this paradox: Despite

**G**IVEN THE CURRENT STATE OF affairs in our policies regarding endangered species, we may someday find the Fish and Wildlife Service (FWS) refusing to protect the only domestic population of the American bald eagle as it becomes extinct. The mandate of the Endangered Species Act (ESA) to protect threatened wildlife has serious weaknesses. Due to existing policies

Congressional desire to designate DPSs solely based on “biological evidence,” the fact that “distinct population segment” is not a scientific term means that the existence of one cannot be established scientifically.

In 2003, the Ninth Circuit faced a challenge to FWS application of DPS Policy in the case *National Association of Home Builders v. Norton*, which disputed FWS’s listing of the Arizona western pygmy-owl population. The association argued—and the court agreed—that this population did not warrant protection because it was not “significant” to the whole species. While acknowledging that loss of the Arizona population could cause the “[e]xtirpation of the western pygmy-owl from the United States,” the court deemed this irrelevant, since DPS Policy requires that the population be “significant ‘to the taxon to which it belongs.’” Since the pygmy-owl was thriving in Mexico, FWS could not list the Arizona population.

#### REASONS TO PROTECT SPECIES THREATENED WITHIN OUR BORDERS

Current DPS Policy—based upon *Home Builders*—restricts the ability of FWS and NMFS to protect domestic populations of species, which is problematic because there are compelling reasons to protect them. Do-

Also, when the U.S. allows domestic populations to become extinct, we rely on other countries to protect species, and they may not—especially developing countries that are focused on improving their economies and disinclined to sacrifice economic development to preserve potentially useful species. Only highly developed countries may be willing to protect endangered species.

Third, when a species exists in many countries, even concerned countries may not protect the species, resulting in global extinction. If an endangered species is equally divided between countries A and B, neither A nor B has an incentive to protect the species, as each will want to “free ride” off the other’s efforts. Accordingly, both countries will fail to protect domestic populations, causing the species to become extinct.

Even when protecting U.S. populations does not enhance international protection, Americans may value having species in their nation. Certain species have cultural significance to Americans, such as the American bald eagle, while others have aesthetic value, which increases tourism. For example, whale watching is a popular tourist activity in the Puget Sound—particularly since it offers the only accessible killer

Specifically, when a segment is significant to the U.S. population but not its taxon, FWS and NMFS should consider 1. whether the DPS merits protection due to potential risks to foreign populations, and 2. whether it merits protection because Americans value having the species within U.S. borders. To determine if the first criterion is met, agencies should consider 1. the relative abundance of the species elsewhere, 2. conservation efforts in other nations, and 3. the extent of known environmental risks to global populations. To determine if the second criterion is satisfied, FWS and NMFS should seek evidence of the species’ importance to Americans, including appearances in governmental iconography, tourism inspired by the species’ presence, and local movements battling to preserve the species. If either criterion is met, FWS or NMFS should list any population segment also meeting the other requirements of DPS Policy: discreteness and endangered or threatened status.

Some might prefer a bright-line rule to protect all endangered populations within the U.S. instead of protecting only some of them. Certainly, with an abundance of money and resources, a bright-line rule might be desirable. Realistically, however, some domestic populations may be small, and protecting them all could prove costly—for both government agencies and private actors. Also, agencies devoting equal attention to all domestic populations might pay insufficient attention to species whose foreign populations are small, and excessive attention to species whose foreign populations are large, leading them to overlook a looming threat to a domestic population that is close to global extinction. Thus, especially when Americans do not value the species, protection is better left to countries where the species is more abundant.

#### CONCLUSION

Since the loss of a species is an irreversible harm, domestic populations of species merit protection if foreign populations may become extinct, and some species hold cultural, educational, and aesthetic significance for Americans and merit protection regardless of their abundance abroad. To enhance international and national species protection, DPS Policy should be revised to allow government agencies to preserve threatened domestic populations of otherwise unthreatened species in certain instances. Then, Americans would never have to worry about someday losing their most cherished animals. □

## When the U.S. allows domestic populations to become extinct, we rely on other countries to protect species, and they may not—especially developing countries that are...disinclined to sacrifice economic development to preserve potentially useful species.

ing so can serve the goal of international protection, ensuring that species exist somewhere in the world; further, Americans may value having species within their country regardless of global populations.

Protecting domestic populations of endangered species whatever their overall significance reduces the odds of species becoming extinct. Current DPS policy fails to distinguish between a domestic population found only in one other country and a species abundant throughout the globe. However, a species will more likely vanish if there are only two populations in two countries, as opposed to several populations in multiple countries. Preserving a domestic population would be prudent in the first case, and unnecessary in the second case.

whale population in the continental U.S. Similarly, the Cook Inlet beluga population promotes tourism, which is crucial to Alaska’s economy. Having species within the U.S. has educational value as well, as it facilitates scientists’ ability to study these species.

#### A PROPOSED SOLUTION

There are two problems with current DPS Policy: failure to adequately meet the goal of international protection by not preserving domestic populations that may become extinct elsewhere, and failure to protect species that we value having within U.S. borders. To solve these problems, the significance standard of DPS Policy should be revised to allow listing DPSs endangered solely within the U.S. in certain circumstances.



# The Bailout: Government As Both Shareholder and Policymaker

*The juxtaposition of two different courses inspired Matthew Shahabian to delve more deeply into issues raised by the government's response to the 2008 financial crisis. In Professor Richard Stewart's Administrative and Regulatory State, Shahabian examined the government's unprecedented actions in the bailout, and in Corporations, taught by Professor Jennifer Arlen, Shahabian studied a typical shareholder's options when a corporation is in trouble. The contrast intrigued him. "It seemed like there was an interesting intersection to explore," Shahabian said.*

*Both a Furman and a Pomeroy Scholar, Shahabian is an articles editor of the NYU Law Review. He wrote his note, "Government Shareholders and Political Risk: Procedural Protection in the Bailout," as the culmination of a project for the NYU School of Law's Institute of Judicial Administration, with the assistance of professors Oscar Chase, Troy McKenzie '00, and Geoffrey Miller. Shahabian graduated magna cum laude from NYU's Stern School of Business in 2008 with a B.S. in economics and finance. In 2010, he worked as a summer associate at Debevoise & Plimpton in New York City.*



But even after the immediate threat of the collapse of the financial system passed, the government continued to maintain an equity stake in the largest corporations. The EESA was designed to provide short-term liquidity and stability to the financial markets, primarily by purchasing "troubled" assets like mortgage-backed securities. This purpose and structure did not give guidance to shareholders about how Congress expected the government to manage corporations beyond stabilizing the economy—medium-term management as opposed to short-term crisis relief. Though shareholders could traditionally look to the courts to counter both the risk of an agency acting arbitrarily and capriciously or a controlling shareholder using the corporation for its own interest, those procedural safeguards do not exist when the shareholder is the government, immune from judicial review. This creates political risk.

The disbursements from the TARP have ended and the big banks have repaid their loans. But political risk increases the cost of capital for government-owned corporations and lowers their value, meaning that future financial bailouts could be more efficient if they contain some procedural protections that reduce this risk. To address these problems, I argue for both a clear outline of principles guiding government management of public corporations and some form of effective judicial review.

## GOVERNMENT AS SHAREHOLDER, GOVERNMENT AS POLICYMAKER

How does government's power as a shareholder differ from its traditional power as a regulator and lawmaker? First, although agency regulations and determinations are traditionally subject to judicial review, actions taken pursuant to government's role as a shareholder were, for the most part, unreviewable by the judiciary. Second, although agency action is subject to the procedures in the Administrative Procedure Act, such as allowing notice and comment for any proposed regulation, the government could use its role as a shareholder to informally influence corporate policy and bypass the procedural safeguards in the APA. Third, through the TARP, the government had additional leverage against a corporation and its executives through limitations on executive pay, corporate luxury expenses, and lobbying expenditures.

The extraordinary power the government possessed over corporations as a shareholder, coupled with the lack of Congressional guidance for post-crisis management of these corporations, created a potential problem. Without procedural safeguards, the government may have used its position to further political goals and engage in informal policymaking by influencing corporate policy. Without clear priorities for government management, Treasury (and the executive) decides what that policy would be. The government stated it was taking a non-interference approach to management, but the evidence presents a mixed picture.

Citi provided the most interesting picture of government influence. The government pushed for a variety of goals, including selling overseas subsidiaries, increasing liquidity, promoting foreclosure mitigation, decreasing risky ventures, and threatening management shakeups. In order to curry favor with the government, Citi reduced mortgage payments for homeowners who lost their jobs. Additionally, a dispute between the government and Citi over the pay of one of Citi's top traders led to Citi selling its highly profitable commodities trading division at a "bargain-basement price" to avoid a potential confrontation with the government.

Investors weigh the risk of political interference when valuing potential investments, and will demand a higher return on their investment as compensation for political risk. Some level of political risk is inevitable when the government interferes in the marketplace. But the government's ability to use corporations for informal

**T**HE FINANCIAL CRISIS OF 2008–09 prompted the most massive intrusion of government into the private sector since the Great Depression. Congress authorized \$700 billion to strengthen Wall Street's financial institutions through the Emergency Economic Stabilization Act of 2008 (EESA), which created the Troubled Asset Relief Program (TARP). The U.S. Treasury Department used this authorization to give money to the banks in exchange for shares.

For the most troubled institutions—Citigroup, AIG, and Bank of America—the government became their largest shareholder. In this position the government wielded considerable influence over corporate policy. Congress passed the bailout legislation in a time of crisis and panic that demanded immediate action by the government. Judicial review of Treasury's actions was severely limited, possibly to give Treasury the ability to respond to the financial crisis without being tied up by the courts.

policymaking, without clear priorities for management set by Congress, increases that risk. Political risk lowers the value of the firm and increases its cost of capital.

#### CHECKS ON GOVERNMENT CONTROL

The government shareholder as policymaker blurs the line between government action and corporate action. Traditionally, private parties could turn to the judiciary for procedural safeguards to address their grievances in each context. If a government agency acted arbitrarily, abusively, or contrary to Congressional intent, an injured party could sue for relief under the Administrative Procedure Act. Likewise, if a controlling shareholder used the corporation for its own interest at the expense of shareholders, a shareholder could sue under corporate law. But, in this past financial crisis, where the government agency was the controlling shareholder, neither administrative law nor corporate law imposed procedural constraints on government action.

Typically, a person aggrieved by an agency action can have that action reviewed by a judge under the Administrative Procedure Act. The agency's actions, for example, must not have violated the Constitution, exceeded the agency's statutory authorization, or been decided arbitrarily and capriciously. This review hinges on the availability of effective relief. The APA waives sovereign immunity for suits against the government seeking equitable relief. This waiver, however, may be circumscribed by any other statute that retains sovereign immunity. The EESA does just that.

Although the EESA permits suits under the Administrative Procedure Act (APA), the exceptions to judicial review and relief listed in the EESA appear to gut this provision of any real enforcement power. Section 119 blocks equitable relief for any suit pursuant to Treasury's exercise of power under the EESA, except for violations of the Constitution. With the exception of constitutional challenges, there does not appear to be any viable suit against the Treasury when it exercised its powers under the EESA.

Delaware corporate law protects minority shareholders from controlling shareholders who use the corporation to advance their own interests at the expense of minority shareholders. But Delaware corporate law is unlikely to apply to a political actor like the government, both because Delaware has only blocked conduct where the controlling shareholder tries to benefit itself financially, and because Delaware courts do not want to adjudicate a federal bailout. Further, Delaware law is not an effective solution for government control; the government would be unable to take necessary actions to restore financial stability if those actions hurt minority shareholders.

#### PROVIDING PROCEDURAL REVIEW OF GOVERNMENT MANAGEMENT

In any major crisis, the judiciary will inevitably play a minor role. The courts are likely to avoid deciding political questions, and lack the ability to act swiftly and with the same authority as the other branches of government. But when that crisis passes, as in the medium-term management of

government-controlled corporations, the judiciary can step back in. By allowing for some form of procedural review through the APA, judicial review can mitigate some of the political risk associated with government control without cabinining the government's ability to respond decisively to a financial crisis.

The EESA does not address how government should manage corporations it controls. The competing goals and objectives provided in EESA do not provide a consistent framework for Treasury to manage corporations, and may make it difficult for any reviewing court to determine whether an agency acted arbitrarily and capriciously by not following the considerations listed in the statute. This note offers a limited set of hierarchal principles for Treasury to provide such a framework. By first acting in the immediate interest of economic stability, then by protecting the taxpayer's investment, and finally by acting in the interests of the corporation, these duties give Treasury enough discretion to accomplish its goal of restoring financial stability while constraining conduct that extends too far.

Principles are not rules; they do not tell the government what to do in every given situation. An arbitrary and capricious standard of review balances deference to Treasury's need to address the financial crisis with providing shareholders with a mechanism for review and justification of questionable decisions. Although this creates a standard of review that is lower than the standard of conduct outlined in this note, it parallels how shareholder suits function in corporate law, and thus provides adequate protection for minority shareholders, while giving the government the flexibility to respond to changing circumstances in the financial markets without the fear that their every decision will be overturned.

#### CONCLUSION

Government control of private corporations creates political risk for shareholders. The potential for informal policymaking, abuse, and discouragement of private investment suggests any future financial bailouts should include procedural protections for shareholders. By focusing review on vindicating procedural interests, judges can protect the process by which the government controls bailed-out corporations without second-guessing the substantive decisions made. The judiciary may be ineffective in a crisis, but when that crisis passes, the rule of law can improve the resolution of government response for both the rescuer and the rescued. □

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# plan your legacy



# Café Society

During the last eight years the *Law School* magazine has introduced 32 faculty members—plus the six additions profiled in the preceding pages—by describing their scholarly and teaching credentials, the agile minds they focus on everything from bankruptcy law to torts, and their personalities and unique interests. “This is a faculty that is convivial and highly professional,” says Richard Epstein. To understand why he’s depicted doing a crossword puzzle, or why Kenji Yoshino is sitting with Yorick, go to [law.nyu.edu/2010mag/recruits](http://law.nyu.edu/2010mag/recruits).

Samuel Rascoff

Katrina Wyman

Roderick Hills Jr

Jennifer Arlen '86

Oren Bar-Gill

Mitchell Kane

Cynthia Estlund

Kenji Yoshino

Deborah Malamud

Florencia Marotta-Wurgler '01

José Alvarez

Margaret Satterthwaite '99

Troy McKenzie '00

Jeremy Waldron

Robert Howse

Katherine Strandburg





John Ferejohn

Smita Narula

Barton Beebe

Richard Epstein

Samuel Scheffler

Daniel Hulsebosch

Ryan Goodman

Catherine Sharkey

Lily Batchelder

Arthur Miller

Stephen Choi

Rachel Barkow

Cristina Rodríguez

Samuel Issacharoff

Kevin Davis

Moshe Halbertal





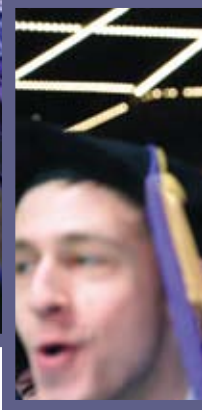
"A law degree doesn't  
offer one path to  
success, it offers many."

.....  
Dean Richard Revesz



"Lean in and  
tackle adversity  
with creativity  
and innovation."

.....  
Valerie Jarrett



# Convocation 2010

President Obama's senior adviser  
challenges graduates to find their  
purpose and passion.

"You must care deeply  
about what you do."

**F**ROM THE INNER CIRCLE OF A HISTORY-making White House, Valerie Jarrett came to Madison Square Garden on May 14 to tell more than 1,000 members of the Class of 2010 that they will encounter uncertainty and setbacks, but "if you lean in and tackle adversity with creativity and innovation...you will have the potential to create an insurmountable force to help lead our country to a brighter day." Interweaving the personal and the political, Jarrett chronicled her own "circuitous career," which took her from the University of Michigan Law School in 1981 to her current position as a senior adviser to President Barack Obama and assistant to the president for intergovernmental affairs and public engagement.

Jarrett made a distinction between success and its glittery trappings on one hand,



"The kids in my family often joke that graduations are a lot like weddings—both are a lot more fun when you realize it's not just about you. Moments like these are truly a family affair."

.....  
Helam Gebremariam '10, J.D. Class Speaker

and fulfillment and a sense of purpose on the other. She steered her audience toward the latter, describing her early career at a Chicago law firm to illustrate the difference. "I came in early, and I stayed late. I did everything I thought I should do with my hard-earned law degree," she recounted. "And within six years, I had also married, given birth to my darling daughter, and divorced." Then, Jarrett said, she reached a turning point: "One day, while I was sitting in my lovely office on the 79th floor of the Sears Tower, looking out my window at an extraordinary view of Lake Michigan, I began to cry." Realizing that she had been pursuing what she thought she should do, "not what gave me fulfillment or purpose," Jarrett struck out in a different direction that would take her

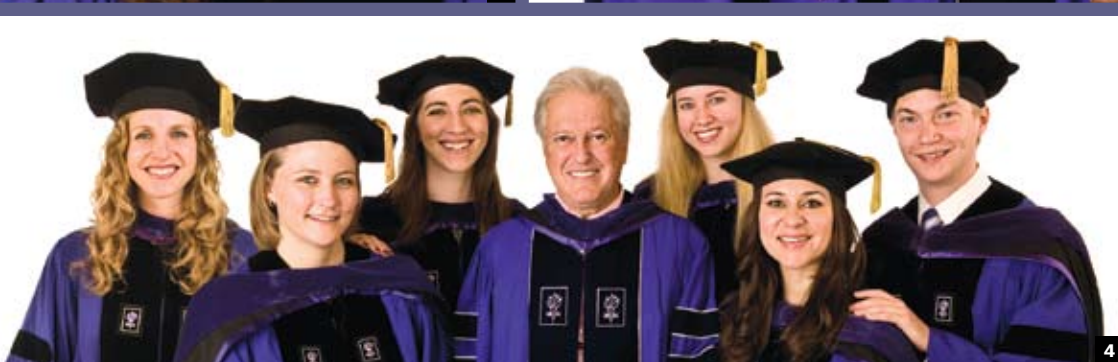
into government, notably as deputy chief of staff to Chicago mayor Richard Daley, and business, as president and CEO of the Habitat Company, a private residential property manager in Chicago. "You must care deeply about what you do, or you will not have the endurance to sustain your effort or achieve your goals—and you will certainly not be able to lead by instilling passion in others," she said. Jarrett also told the newly minted grads that while her career veered from the practice of law, having a law degree gave her "the confidence to know that...I had a safety net."

The buoyant ceremonies were tempered by the terrible loss of two members of the graduating class who were honored during the ceremonies. Lucas Johnson died on April 30 after a valiant battle with

cancer; Mattei Radu passed away on May 7 due to complications from asthma and a previously undiagnosed heart condition. Their classmates dedicated the Class of 2010 Graduation Gift to them. Totalling more than \$100,000, it was presented by Sabrina Ursaner '10 and Aleksandra Krawciewicz (LL.M. '10). In addition, Johnson, who had completed five semesters, was declared an honorary member of the Class of 2010. Luc Radu accepted an LL.M. degree on his brother's behalf.

Before the graduates filed out, Dean Richard Revesz encouraged them to maintain their connections and rely on one another as they join a global community of 40,000 NYU School of Law alumni: "Know that the door is always open back at Washington Square." □





# Pride and Joy

Beaming relatives and scholarship donors hood members of the Class of 2010 and celebrate the achievement of attaining a degree from the NYU School of Law.





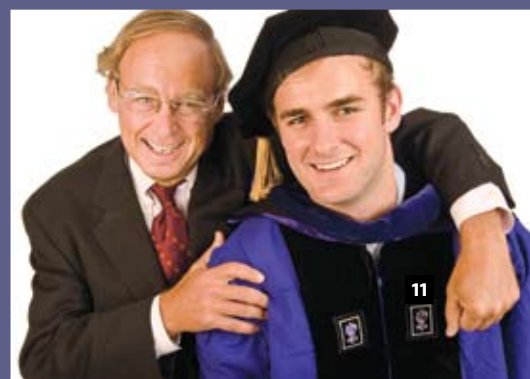
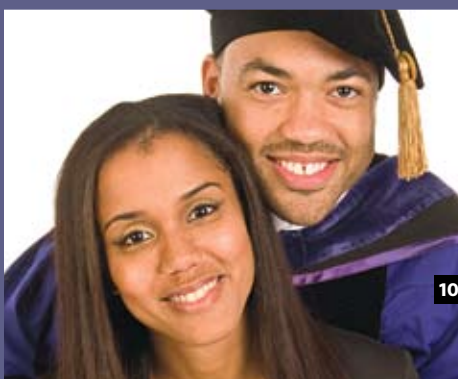
## Scholars and Donors, Left

1. John J. Creedon Scholar Meagan O'Toole was hooded by Law School Life Trustee John J. Creedon '55 (LL.M. '62).
2. Coben Scholar Kara Werner was hooded by Jerome Coben '69.
3. AnBryce Scholars (clockwise from top left): Mikkell Deke Shearon, Gabriel Jaime, Michelle Paul, Rebecca Oliver, Lemar Moore, Kathiana Aurelien, Timothy Dixon, Monique Robinson, and Helam Gebremariam were hooded by Anthony Walters '77, chairman of the Law School's Board of Trustees, and Ambassador Beatrice Walters. (Not photographed: Sambo Dul.)
4. Furman Scholars: Rebecca Talbott, Laura Miller, Margot Pollans, Allison Westfahl Kong, Sofia Martos, and Daniel Deacon were hooded by Law School Trustee Jay Furman '71.
5. Keren Raz, recipient of the Jacobson Family Foundation Public Service Scholarship for Women, Children and Families, was hooded by Kathy Jacobson.
6. Ryan Gee, recipient of the Jacob Marley Foundation Scholarship in Memory of Christopher Quackenbush, was hooded by Traci Viklund Quackenbush.
7. Kenneth and Kathryn Chenault Scholar Helam Gebremariam was hooded by Law School Trustee Kathryn Chenault '80.
8. Pfeifer-Gans Family Scholar Andy Ho was hooded by Maxwell Pfeifer '49.
9. John Sexton Scholar Katherine Marshall was hooded by Chair Emeritus Lester Pollack '57. (Not photographed: Lauren Nichols.)
10. WilmerHale Scholar Julia Sheketoff was hooded by Brian Johnson '99.
11. Sinsheimer Public Service Scholar Sara Zier was hooded by Law School Trustee Warren Sinsheimer (LL.M. '57).

## Legacy Families, Right

1. Rhys Broussard with his father, Robert Broussard '82.
2. Laura Collins with her mother, Mary Ann Bradshaw '79.
3. Mindy Friedman with her cousin, Elizabeth Granville '64.
4. Gil Ghatan and Jeanette Markle, affianced, hooded each other.
5. Rachel Goodman with her father, Stephen Goodman '77, and mother, Judith Goodman '79.
6. Alison Morgan Hashmall with her mother, Wendy Harrison Hashmall '77 (LL.M. '80), her father, David Hashmall '77, and her cousin Nina Harrison (LL.M. '09).
7. Daniel Jenny with his brother, Reto Jenny (LL.M. '09).
8. Susan Moser with her grandfather, Law School Trustee Warren Sinsheimer (LL.M. '57).
9. Benjamin Silverman with his father, Moses Silverman '73.
10. Jason Spears-Smith with his partner, Priscillia Kounkou-Hoveyda (LL.M. '08).
11. Alexander Tinucci with his father, Victor Tinucci '72.

Photographs by Leo Sorel

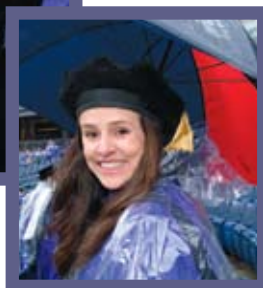






# Commencement 2010

Rain couldn't dampen the cheers and the laughter as law graduates celebrated, and Alec Baldwin gave a surprisingly serious speech.



"America runs on capitalism and democracy in an often conflicting arrangement. The success of that arrangement requires the work of dedicated and honorable Americans who will aggressively protect what we have in this country. And when you look at the world today, even considering America's problems, we still have a great deal to protect. Protecting what we have means giving back while we are striving to get ahead."

.....  
Alec Baldwin  
*Actor and Activist*  
*Recipient, Honorary Doctorate of Fine Arts*

## Singapore Convocation

"You will be the transformation"

The NYU@NUS program held its 2010 convocation on February 22 at the Asian Civilisations Museum in Singapore. Walter Woon Cheong Ming, then-attorney general and former solicitor general of Singapore, was the guest of honor.



Speaking on behalf of the 2010 class, which included 30 students from 19 countries, were Andrew Rudisill Vinton of the U.S. and Tiwari Soni Amarnath Pushpa of India. Both students reminisced about the unique experience of this dual-degree, one-year program. "[Singapore] is a place where many roads meet and then again diverge. Likewise, our paths have converged," said Vinton. "We have come from different countries, backgrounds, and experiences, met here for a common purpose, and will again go our separate ways."

The program awards an LL.M. in Law and the Global Economy from NYU Law and an LL.M. from the National University of Singapore, and has now graduated more than 100 students in its three-year history. Professor Tan Eng Chye, deputy president and provost of NUS, highlighted the international links that have been forged by both the universities and the students. "You are now uniquely equipped to work and research anywhere in the world, with the reputation of both NYU and NUS behind you," said Chye. "You are also part of a transformation in the way in which we think about law and the possibilities for collaboration across countries. As a matter of fact, you will be the transformation."





## Student Spotlight

Introducing the NYU Law Forum | 82

Keren Raz, Social Entrepreneur | 84

Camilo Romero Takes Action | 85

Student Symposia | 86

Student Awards | 88

Babener's Unconventional Wisdom | 89

Valerie Jarrett Speaks at Convocation | 90

Finishing-Line Photos: Hooding Album | 92

Singapore Celebrates Third Convocation | 94

Wildlife and Bailouts: Student Scholarship | 95

NYU Law beat Columbia for the second straight year, 55-45, to win the 2010 Deans' Cup. The ninth annual game scored \$45,000 to be evenly split between the two law schools to fund their public interest programs. At halftime, the schools' faculty teams took the court, with Columbia's professors winning 8-7.





# Meetings of the Minds

A star-studded weekly Law School event draws crowds and high-minded debate—building community spirit along the way.

**I**N A CALENDAR ALREADY PACKED WITH academic events, Vice Dean Barry Friedman dared to add an ambitious weekly panel discussion in which well-known experts as well as principal actors would address the most current legal issues of the day, including health care reform, corporate bankruptcy, and *Citizens United*. Launched last September, the Forum has been a resounding success, inspiring lively intellectual debate and discussion in the student body and fostering a deeper sense of community at the school.

One of the keys to the Forum's success was stipulating that it would be the only event that could be programmed during the Wednesday lunchtime slot. "People are often fragmented into their individual groups," says Friedman, who organized the series and often moderated the sessions. "The idea was that students might enjoy having one activity that they all could attend." Indeed, he's heard the buzz in the halls from students discussing forums even the next day.

To earn this high level of interest and enthusiasm from the student body, Friedman, aided by assistant Sara Lewin, invited students to contribute conceptual ideas. The result is a mix, over 22 sessions, of both evergreen topics—the best approach to acing exams or choosing note topics, for example—and subjects "ripped from the headlines," à la an episode of *Law & Order*. "If something's happening in the world, it's great to be able to organize a Forum on it," Friedman says. Most forums pair outside experts with Law School faculty—a good way, he adds, to showcase faculty scholarship. "Some people like to see high-profile individuals," he says. "I certainly learned that if you ask people, they do come."

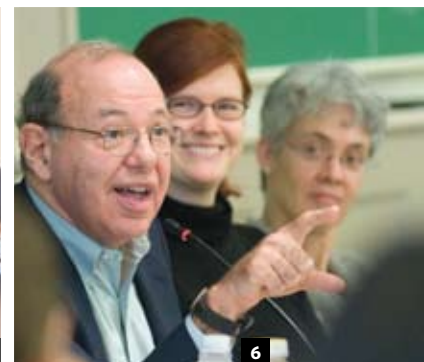
Indeed, one of the most anticipated forums of the academic year was the first one,

a debate on health-care reform between Judy Feder of the Georgetown Public Policy Institute, whose ideas on financing reform have been noted by President Obama, and Richard Epstein, Laurence A. Tisch Professor of Law, a noted libertarian. Their sparring produced memorable lines such as Feder's, "It's time to stop scaring people into thinking that they're going to be worse off with health reform," and Epstein's, "What you're watching here is a grotesque concatenation of every bad left-wing liberal policy in the last 40 years, and the time has come to stop it."

A forecast of the Supreme Court's most recent term featured probing insight from guests such as Paul Clement, former U.S. solicitor general and Law School adjunct faculty member; Professor Rachel Barkow; and Jeffrey Toobin, author of the bestseller *The Nine*. "I don't say out of criticism that the Court is a deeply ideological body," Toobin said. "I don't think there is any other way to decide these cases except ideologically. I just wish they'd be honest about it."

His words would resonate months later, when a major player discussed *Citizens United*, one of the cases eagerly anticipated by that Supreme Court panel. Legendary First Amendment lawyer Floyd Abrams, who successfully argued in support of *Citizens United* for the rights of corporations and unions to speak publicly about politics and elections, said, "The fact that four members of the Supreme Court were prepared to sign on to the notion that this speech was not protected by the First Amendment is... very troubling indeed."

**FORUM FACES** 1 Friedman; 2 Toobin; 3 Feder; 4 Revesz and Katzen; 5 Professor Troy McKenzie '00 at a Forum on automaker bailouts; 6 Burt Neuborne, Erin Murphy, and Elizabeth Tillinghast, panelists at a Forum on speaking out in the classroom; 7 Barkow; 8 Epstein; 9 Spitzer; 10 Gray; 11 Clement.



The impressive roster of speakers continued throughout the year. Wall Street's foe, former New York governor and attorney general Eliot Spitzer, was surprisingly measured on the question of how financial institutions should be regulated in the aftermath of the crisis: "This isn't about good people and bad people. This is about ideology gone awry, government failure, private sector failure.... Angry populism is not any better a guide to policy than libertarianism masquerading as capitalism."

**"What you're watching here is a grotesque concatenation of every bad left-wing liberal policy in the last 40 years." —Richard Epstein**

For a behind-the-scenes peek at agency regulation in the current administration, longtime Washington insiders C. Boyden Gray, White House counsel to President George H.W. Bush, and Sally Katzen, administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs in the Clinton administration, joined regulatory policy expert Dean Richard Revesz. Vividly describing the stark contrast between the George W. Bush and

Obama views of regulation and policymaking, Katzen spoke of long-suffering employees weeping and embracing members of Obama's agency review team during the transition.

The Gray and Katzen session had particular appeal for Daniel Nudelman '12, who had recently covered the topic in his Administrative and Regulatory State class. "We had just studied two executive orders," he says, "and then we got to see the two people that wrote them. It was pretty awesome."

Helena Haywoode '12, concurs: "One thing that the Forum does is allow students to explore current legal topics that there isn't time to cover in class," she says, "and it simultaneously exposes us to the leading thinkers in those topics—leading actors, even. It's a wonderful opportunity."

That kind of student enthusiasm has gratified Friedman. "It became apparent immediately that there was a real student interest in this sort of thing," he says. "We wanted a place where students could participate, to feel a part of it. The goal has always been both to educate and to provoke."

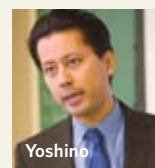
But not to provoke too much, he adds. "Disagreement's fun, but we often learn the most when people from different viewpoints manage to agree," says Friedman. "One really nice thing about the Forum is that it's an extremely civil conversation. Whatever my or anyone else's hopes were, we far exceeded them." □ *Atticus Gannaway*

For videos of the Forum:  
[law.nyu.edu/2010mag/theforum](http://law.nyu.edu/2010mag/theforum)

## LGBT Rights: I Dos and Don'ts

With same-sex marriage and the military's "don't ask, don't tell" policy coming to the forefront of civil rights in the United States, Dean Richard Revesz created the Dean's Workshop on LGBT Rights last fall to provide an open forum for the NYU community to delve into LGBT issues. Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, moderated the monthly series.

Two leading litigators served as bookends for the workshop, which began in October. That month, Yoshino sat down for a conversation with Paul Smith, chair of appellate and Supreme Court



Yoshino



Boies

practice at Jenner & Block, who successfully argued *Lawrence v. Texas*, the 2003 Supreme Court case that invalidated statutes criminalizing sodomy. In April, veteran attorney and NYU School of Law trustee David Boies (LL.M. '67), who filed the first federal constitutional

challenge to the ban on same-sex marriage, argued his point, that the case was not "about whether marriage is a good idea but about whether the state can discriminate." A co-panelist, Adjunct Professor Paula Ettelbrick, noted that the right-wing has made "gay marriage heart and center" in the same way that abortion became the hot-button of feminism. "We're in a struggle again to defend choice," she said.

In between, the workshop tackled transgender issues; comparative and international perspectives on gay rights using recent developments in sub-Saharan Africa as a case study; and the effect of media, medicine, and industry as engines of civil rights. A "don't ask, don't tell" panel, co-sponsored by the NYU Law Forum (see story, left) in January, featured a U.S. Marine who chose to re-closet himself when deployed for a tour of duty in Afghanistan.

"The Dean's Workshop Series on LGBT Rights has been an unequivocal success," says Yoshino. "It permitted us to take many different cuts at one of the major civil rights issues of our time."



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# Business for Good

**Keren Raz '10 is using law to build bridges between the worlds of profits and social philanthropy.**

**A**S EARLY AS JUNIOR HIGH, KEREN Raz '10 was devoting time to non-profit work, trying to empower young people through education. But she came to recognize that volunteering alone wasn't enough to make a real dent in society's most intractable problems, a realization that eventually grew into an interest in social entrepreneurship, or the practice of applying business solutions to social challenges. What's needed, she says, is to give people "new ways to solve problems when what exists isn't working."

Expecting to find a well-beaten path for combining law and social enterprise when she arrived at NYU School of Law, Raz instead received blank stares whenever she mentioned "law" and "social entrepreneurship" together. Some asked why she wasn't getting an MBA or public policy degree. Sensing an unfilled niche, Raz began talking to other students. "A large number felt they were in between the traditional firm world and the traditional public in-

terest world," she says, "and they wanted to be able to do both."

So in 2008 she co-founded the Law and Social Entrepreneurship Association (LSEA). Now 350 members strong, the organization reflects Raz's interest in bridging disciplines. A recent symposium on social-enterprise solutions for rebuilding Haiti marked one of the first times that the School of Law, the Wagner Graduate School of Public Service, and the Stern School of Business had collaborated on an event. A lecture series, Inside the Social Entrepreneurs Studio, brings innovators to campus on a regular basis. "People are looking to NYU Law as one of the future leaders of law and social enterprise," Raz says.

As an NYU Reynolds Graduate Fellow in Social Entrepreneurship,

Raz researched hybrid entrepreneurial models that straddle the for-profit and non-profit worlds to solve pressing social problems in innovative ways. (On the side, she's helped friends engaged in projects as varied as fighting corruption and crime in Mexico and creating a hip-hop education center.) Post-J.D., she's now at the Law School on another fellowship, working on a corporate governance project with Professor Helen Scott.

"The LSEA tapped into a clear, strong river of interest among law students," says Scott, co-director of the Jacobson Leadership Program in Law and Business, who has worked closely with Raz in developing a social entrepreneurship curriculum. "I think we are going to be the first major law school to have a real curricular focus for people interested in social enterprise from the law school side. Keren has been instrumental in moving that forward. She's a visionary, but she combines that with a real down-to-earth sense of how you get it done." □



## Economic Revue

The premise of the 36th annual Law Revue, "How to Succeed in Law School Without Really Trying," was that the global recession is an evil plot concocted by the assistant dean for public interest law to enable all legal services to hire top lawyers at low salaries.



The 16th annual Public Service auction raised \$95,000 to fund student public interest summer internships at organizations such as the Bronx Defenders, the U.S. Attorney's Office, and the International Criminal Court. "In this economy," says Sara Rakita '98, associate director of the Public Interest Law Center, such grants "are more crucial than ever."

The silent auction and live auction together featured hundreds of items and services donated by alumni, faculty, students, and local businesses. The biggest-selling item was a weekend at the Connecticut farmhouse of Dean Richard Revesz and Professor Vicki Been '83, which went for \$2,600. For \$2,000, another bidder won a weekend getaway to the home where Bob Dylan and the Band collaborated on some of their classic songs.

# The Passionate Activist

NYU Law's new Soros Fellow is dedicated to fighting injustice.

**G**ROWING UP, CAMILO ROMERO '12 SAYS, "I was often angry." His awareness of injustice fueled a passion to defend the weak and disadvantaged that has recently been recognized as he becomes the third NYU Law student since 2005 to win a Paul and Daisy Soros Fellowship for New Americans. "There was a very big pebble in my shoe," he says. "In fact, in both shoes." But he chose idealism over despair.

Born in California after his family escaped the violence in Colombia, Romero grew up in a working-class household in Costa Mesa that included his mother, an administrative assistant; his grandmother, a housekeeper; and his younger sister.

Even before college, Romero was interested in immigrant rights and community building. At the University of California, Berkeley, Romero found a language for his passion to correct injustice. He also encountered the cause that would come to define much of his life: holding multinational corporations accountable for human rights abuses of their workers and others.

Initially becoming involved with SINAL-TRAINAL, Colombia's largest food and beverage industry union, because of U.S. military intervention in Colombia, Romero soon joined a campaign against Coca-Cola, helping organize campus boycotts across the United States to pressure the company to address allegations of abuse of union organizers in Coca-Cola facilities in Colombia. (In a statement on its website, Coca-Cola defended its reputation and said that, "for as long as we have been in Colombia, the Company and the independent franchise bottling partners have made efforts to protect the Coca-Cola workforces.")

"Camilo is strikingly passionate about social justice as well as having a vigorous understanding of the social world," says Professor Samuel Lucas, who taught Romero at Berkeley. "Those two things provide an unbeatable combination when seasoned by his obvious insight, intellectual capabilities, and empathy for disadvantaged groups and individuals."



The Coca-Cola work brought Romero to New York, where in 2005 he helped win a ban of Coca-Cola products at NYU. He was in the city, too, in February 2009, when the University allowed Coke back on campus. The next day, Romero received an acceptance letter and full scholarship from NYU Law. It was a crisis-of-conscience moment.

"Despite feeling conflicted," he recalls, "it also was motivating to think I could use the opportunity to help attain my goals." His decision to pursue a J.D. had stemmed

largely from litigation against Coca-Cola—he'd seen that activism alone was insufficient. Romero chose NYU for its public service emphasis: "Law school is a tool of access, so no matter what cause you're fighting for, a degree from a school as elite as NYU is leverage."

Now an organizer and member of the legal team for SINAL-TRAINAL, Romero attained more leverage this spring with his Soros Fellowship, which provides tuition assistance to immigrants or children of immigrants. More important, Romero says, the accolade validates his work of the past seven years: "This award is not for me, but for those who will come after me."

Romero actively seeks mentors, even those he hasn't been taught by, such as Professor of Clinical Law Anthony Thompson, an expert in utilizing advocacy to shape public policy. "There are two things about Camilo that are very unique in first-year law students," says Thompson. "One, he comes into the study of law with an acute appreciation for the role of organizing and activism, in addition to litigation, as ways to better the plight of the less fortunate. Two, he's had some experiences outside the country, and he comes with a very broad perspective of what it means to be involved in social justice and human rights issues."

Romero values leadership development, and wants to ensure a path for others. "There's a victory in this struggle," says Romero of his activism. "By the time we die the world will still suffer from inequalities, but if we can make it better, then we've done our part." □ Atticus Gannaway





# Symposia: Urgent Issues Hotly Debated



## **Changes to the Regulatory State: President Obama's Approach to Regulation and Its Impact on Federal Environmental and Health Protections** *Environmental Law Journal*, Environmental Law Society, and Institute for Policy Integrity

In the wake of President Barack Obama's 2009 executive order requiring federal agencies to set 2020 greenhouse gas emissions reduction targets, the Environmental Protection Agency has returned to the mission of ensuring clean air, water, and land through regulation, said Lisa Heinzerling, associate administrator for the EPA's Office of Policy, Economics, and Innovation, in her keynote speech. Yet this cannot be achieved through environmental laws alone, she added. Over the past year, the EPA has worked with other agencies, such as the departments of Housing and Urban Development and Transportation, to promote common goals. Indeed, Heinzerling is a key figure in "one of the most active, forward-thinking, and engaged EPAs in recent memory, if not ever," said Michael Livermore, executive director of IPI, one of the symposium's sponsors, in his introduction of the keynote speaker.

In another important change, said Heinzerling, environmental concerns have been integrated into the rulemaking process. "What we're trying to do is make it so that environmental justice is part of that process from the very beginning," she said. Heinzerling also emphasized the EPA's goal of transparency throughout the rulemaking process. "We're trying to be open about what we do," she said, "so that the public can know, the public can give us advice, the public can understand what we're up to and tell us where we're getting it right and where we're getting it wrong."

## **15th Annual Herbert and Justice Rose Luttan Rubin International Law Symposium: The Privatization of Development Assistance**

*Institute for International Law and Justice  
Journal of International Law and Politics*

Organized by Kevin Davis, Beller Family Professor of Business Law, the Rubin Symposium examined the increasing role of private actors in providing financial assistance to developing societies and looked at new forms of accountability, socially responsible investment, and the relationships between public and private financing.

Davis and co-author Anna Gelpern, an associate professor at the American University Washington College of Law, presented "Person-to-Person Financing for Development: Governing the Intermediaries." They gave an overview of the varying types of regulation applied to banks, charities, and investment intermediaries, pointing out newer hybrid forms in which the definitions of institutions are blurred, with elements of charity, banking, and investment fund operation often combined.

Professor Mitchell Kane served as the discussant of "Tax Aspects of Private Development Assistance," presented by Eric Zolt of the UCLA School of Law. Zolt raised

a series of questions: Should tax benefits extend to charitable activities in foreign countries, and what would the consequences be? Should foreign charities be taxed differently than domestic ones? Should charitable tax benefits be extended to for-profit entities that can provide essentials in places outside the U.S.?

While Zolt came down on the side of subsidizing such activities, for reasons including the level of need in foreign jurisdictions, Kane argued that this conclusion followed from the wrong starting place. "If you begin with the domestic frame, as a matter of domestic tax policy, and then try to map it onto foreign use of funds, there's actually just about a zero case for a charitable contribution deduction," Kane said.

## **Critical Directions in Antitrust** *Annual Survey of American Law*

This event explored recent antitrust developments, government and private oversight, and the future of antitrust enforcement. Among the panelists were Jonathan Baker, chief economist at the Federal Communications Commission; Howard Shelanski, deputy director for antitrust at the Federal Trade Commission's Bureau of Economics; and Philip Weiser '94, deputy assistant

attorney general for international, policy, and appellate matters in the Department of Justice's Antitrust Division.

## **Legal Aftershocks of the Global Financial Crisis**

*Journal of Law & Business*

In the wake of the 2008-09 financial meltdown, what legal and regulatory reforms should be enacted to prevent another crisis? Three panels of legal scholars and practitioners explored this question, covering corporate governance and the prospects of enhanced shareholder power, financial reform legislation and the role of the Federal Reserve, and bankruptcy and restructuring of financial institutions, as well as the concept of banks being "too big to fail." Another hot topic: the role of executive compensation in the crisis and the need to align pay with long-term incentives.

## **From Page to Practice: Broadening the Lens for Sexual & Reproductive Rights**

*Review of Law & Social Change*

Experts from the worlds of academia and advocacy discussed bridging the gap between legal academic scholarship and practitioners' experiences in fighting for sexual and reproductive rights. The distinguished roster of panelists and moderators included Sylvia Law '68, Elizabeth K. Dillard Professor of Law, Medicine and Psychiatry; Judith Resnik '75, Yale Law School; and noted human rights lawyer Janet Ben-shoof, president and founder of the Global Justice Center and founder of the Center for Reproductive Rights. Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, made the closing remarks.

## **Helping America Vote: The Past, Present, and Future of Election Administration**

*Brennan Center for Justice*

*Journal of Legislation and Public Policy*

The 2008 election season brought unprecedented attention to our nation's system of election administration. Fraudulent voter registration, registration list purges, provisional voting, ballot design problems, and oversight by partisan officials were the subject of this symposium on legislative reforms to improve the current system of election administration. Discussions centered on voter registration and technology, ballot design, voter ID laws, and the selection of election officials. The Brennan Center's Executive Director Michael Waldman '87 made the opening remarks. □

## The Tools to Stay in School

Avni Bhatia '10 took a circuitous path to Advocates for Children of New York (AFC), where as a 2010 Skadden Fellow she works to reduce suspensions and ensure that children with behavioral challenges get the support they need to return to class. But in retrospect, every step led her to this mission.

While working as an art gallery tour guide at Yale University, where she majored in art history, she noticed that most of the visiting students were well-to-do children from private schools. So she reached out to the New Haven Public Schools to bring students from across the city to the gallery, and she developed an after-school art curriculum with the city's public schools.



One of Bhatia's postgraduation jobs, as a graphic designer at the Foundation for Child Development in New York, pushed her further toward young people and the law. As she started doing more program work and less design, she was stirred by the foundation, which funds research, policy, and advocacy work related to early childhood education. "The people who I thought were doing the most useful and exciting projects were lawyers," Bhatia says.

Fittingly, her arrival at NYU Law coincided with the birth of a new student group, the Suspension Representation Project (SRP), whose members represent public school students in suspension hearings (see "Awards," page 88). The NYC Department of Education's record in this area isn't pretty: Long-term suspensions almost doubled between 2000 and 2008 (from 8,567 to 16,214); those facing suspension are disproportionately low-income students with disabilities.

Three years spent working with SRP helped Bhatia shape her current AFC fellowship. "Avni came to us unusually prepared," says Kim Sweet, executive director of AFC. Now Bhatia is moving from representing suspended students to working on policy advocacy, outreach, and training, and she's relishing the opportunity to follow children beyond the hearings and have an impact on their lives. "It's so rare for me to meet a student, especially a young student, who does not want to go back to school," says Bhatia. "All kids want to do great things, and we have to facilitate that."

## Moot Points



**Joe Russo '11** won Best Oralist in the elite international rounds of the Philip C. Jessup International Law Moot Court Competition, the world's largest and most presti-

gious moot court competition, which took place last March in Washington, D.C. He was judged the finest among 500 oralists from 127 teams representing 80 countries around the globe.

Russo and his teammates, **Andrew Michaels '10**, **Matthew Walker '10**, and **Julian Arato '11**, were vigorously coached by **Brian Abrams '10** and **Sandeep Challa (LL.M. '10)**. NYU Law Moot Court Board Competitions Editor **Vincent Barredo '10** said, "It's amazing what this team has accomplished; I couldn't be more impressed with their performance and work ethic."

In related news, the 2009–10 Moot Court Board Chair **Casey Donnelly '10** was honored with the New York University President's Service Award for her leadership and contributions to the board. Recognizing her contributions during this outstanding year, the Law School also awarded her the Mark Brisman '92 Moot Court Prize at the 2010 convocation.

## Marden Moot Court: Decided

U.S. Court of Appeals judges Michael Boudin, for the First Circuit, Brett Kavanaugh, for the District of Columbia Circuit, and Kim Wardlaw, for the Ninth Circuit, presided over the 38th annual Orison S. Marden Moot Court Competition last April. Tapping into the current legal quagmire over "sexting," Ada Anon '11 and Sharae Wheeler '11 crafted the fictional case of *Rory Gilmore vs. United States of America*, in which graduate student Gilmore, age 26, was charged with producing child pornography after photographing a nude 16-year-old for a sociology project. Gilmore was sentenced to 15 years in prison, even though the teenager had shown Gilmore

a fake I.D. Appealing on First and Fifth Amendment grounds, Gilmore was granted certiorari by the Supreme Court. Joachim Steinberg '10, who won Best Oralist, and Alex Rossmiller '10, argued for the petitioner, and Daniel Curtin '11, who received the Marden Brief Writing Award, and Benjamin Schaefer '11, represented the respondent. "One of the reasons it's a good problem is that both sides are put into incredibly unattractive positions," said Steinberg. "On one you're defending someone who, in essence, produced child pornography, whereas on the other you're sending a student to prison for 15 years on the basis of her scholarly work."

From left: Steinberg, Schaefer, Boudin, Dean Richard Revesz, Wardlaw, Rossmiller, Kavanaugh, and Curtin



## Excellence Noted: Student Grants, Prizes and Awards



For her efforts to provide legal representation to New York City Housing Authority residents, **Katherine Greenberg '10** was the first student ever to be given the Pro Bono Recognition Award by Legal Services NYC.

The Partnership for Children's Rights named **Scott Hechinger '10** the 2010 Sinsheimer Children's Rights Fellow. He receives a paid one-year fellowship to represent low-income special needs children in administrative hearings who are seeking education and services from the NYC Department of Education and the Social Security Administration.

**Elizabeth Kukura '09** won second place in the first-ever National Advocates for Pregnant Women's student writing contest. Her article, "Choice in Birth: Preserving Access to VBAC," will be published in the Winter 2010 *Penn State Law Review*.

**William Perry '12** is a 2010 Robert Half Legal Scholar, a recipient of a \$10,000 tuition grant from Robert Half Legal and the Minority Corporate Counsel Association, which advocates for the hiring, retention, and promotion of minority attorneys in corporate law departments and law firms.



**Samantha Rayburn-Moore (LL.M. '10)** received a Bill Duffy Memorial Scholarship from the New York State chapter of the Tax Executive Institute.



**Sabrina Ursaner '10** won first place and \$2,500 in the 2010 American Bar Association Business Law Section Mendes Hershman Student Writing Contest. "Keeping Fiduciary Outs Out" was published in the Spring 2010 *NYU Journal of Law & Business*.



**David Warner (LL.M. '09)** was awarded first prize and \$5,000 in the Theodore Tannenwald Jr. Foundation for Excellence in Tax Scholarship's 2009 writing competition. He is the sixth NYU Law student to finish in the top three in the last five years.

New York University honored **Sara Zier '10** with the President's Service Award for her volunteer work with the Suspension Representation Project.

The New York State Bar Association awarded its 2010 President's Pro Bono Service Award to the **Suspension Representation Project** for training law students to represent public school students in New York City Board of Education superintendent's suspension hearings.



## Talent Runs in the Family

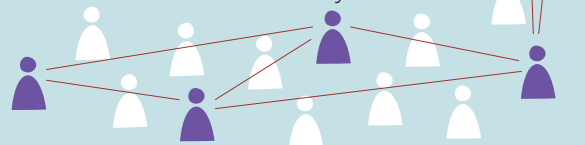
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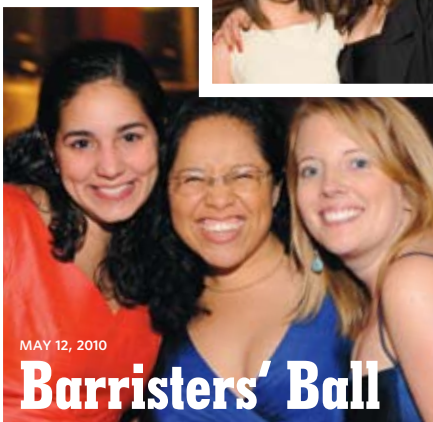
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Enter notices of job opportunities directly into our job database at [law-nyu-csm.symplicity.com/employers](http://law-nyu-csm.symplicity.com/employers). Or submit your job listing by email to [law.careers@nyu.edu](mailto:law.careers@nyu.edu).

Contact Wendy Siegel, director of the Office of Career Services, at (212) 998-6096 to discuss how we can best assist you.





MAY 12, 2010

**Barristers' Ball**

# Sticking with the Facts

Assiduous research led one student to challenge the pros—and conventional wisdom—in the settlement of torts.

**J**EREMY BABENER '10 HAS MADE QUITE a name for himself at the intersection of tax and tort law, having published a journal article, spoken at two national practitioners conferences, and found his work cited at the Treasury—all before receiving his J.D.

As a law clerk in the U.S. Department of Justice Torts Branch during his 1L summer in 2008, Babener quickly impressed the attorneys there with his relentless curiosity and meticulous research. “He never gives a cursory response,” says Gail Johnson, senior trial counsel at the DOJ. “When he hands you the final product, it’s exhaustive.” That summer, Babener first discovered the topic that would direct his academic life for the next two years: structured settlements, in which a defendant agrees to resolve a personal-injury tort claim with periodic payments over time rather than with a lump sum.

While researching structured settlements for his seminar paper in Tax and Social Policy back at school the following fall, Babener kept coming across references to the same piece of conventional wisdom—that personal-injury claimants receiving lump sum settlements dissipated their awards within five years 90 percent of the time. This information was being used to support tax subsidies for structured settlements. Despite a thorough search, Babener found only anecdotal evidence and no empirical confirmation of the notion. “A government incentive as important as the structured settlement tax exclusion deserves to be grounded in statistically valid data,” he says.

This assertion led Babener to an 80-page, single-spaced first draft of his seminar paper, which detailed the history of structured settlements and delved into such fine points as qualified settlement funds that allow the settlement of lawsuits before an agreement is reached on how the amounts will be allocated among the claimants. His professor, Lily Batchelder, suggested he break the draft into two distinct pieces. Babener followed her advice, and both were accepted for publication. The Fall 2009 *NYU Journal of Law & Business* included his note, “Justifying the Structured Settlement Tax Subsidy: The Use of Lump Sum Settlement Monies,” and the *NYU Journal of Legislation & Public Policy* published

“Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History” as an article in Winter 2010.

Babener’s diligent research had led him to contact and share drafts with practitioners and academics, and the interest was returned. First, organizers of the 2009 annual conference of the Society of Settlement Planners in Washington, D.C., invited him to attend. Then he presented his research findings and participated in a panel discussion at the 2009 National Association of Settlement Purchasers annual conference in Las Vegas. Patrick Hindert, co-author of the legal reference book *Structured Settlements and Periodic Payment Judgments* and editor of the blog *Beyond Structured Settlements*, posted an extensive two-part article analyzing Babener’s work, then enlisted Babener as a contributing author. At the 2010 Settlement Planners conference Babener gave a presentation and participated in a panel discussion. The feather in his cap: In February 2010, his research was cited in a U.S. Department of the Treasury hearing on the part of the tax code underpinning structured settlements. “Being in contact with those in the industry has allowed me to write from a position of knowledge that would not have otherwise been possible,” Babener says.

A 2010-11 Tax Policy Fellow, Babener is pursuing a master of laws in the Graduate Tax Program. He plans to return to his hometown of Portland, Oregon in 2011, joining top Pacific Northwest firm Lane Powell, where he was a 2009 summer associate. He’ll no doubt hit the ground running. “Jeremy has made a large name for himself in a very short time due to the integrity of his work,” says Batchelder. “He’s a real self-starter and is completely interested in getting things right and improving policy.” □  
Brad Tucker







## Around the Law School

- .....
- Bloomberg on Course for Housing | 100
  - Amartya Sen Inaugurates Straus | 100
  - Dominican President Critiques U.N. | 101
  - Voices on the Financial Crisis | 102
  - Military Weighs in on Afghan War | 103
  - Fourth Amendment in the Digital Age | 104
  - Putting a Cork in the Filibuster | 105
  - Van Jones's Green Economy | 108
  - Shutting Off Foreign Tax Havens | 108
- .....

New York Attorney General Andrew Cuomo discussed his career in public service at the Abrams Public Service Lecture last September. In May, he announced his candidacy for governor of New York.



## A Recession Is No Excuse

New York City mayor reaffirms a commitment to housing.

**M**ICHAEL BLOOMBERG, MAYOR OF New York City, kicked off the inaugural event of the Furman Center for Real Estate and Urban Policy's new Institute for Affordable Housing Policy last February. In his keynote, Bloomberg reaffirmed the city's 2002 commitment to build and preserve 165,000 affordable housing units for a half-million New Yorkers by 2014, the end of his third term.

The city has funded the creation or preservation of nearly 100,000 units citywide, Bloomberg said. He detailed a four-pronged strategy to keep his New Housing Marketplace plan on track despite the crippling recession: creatively using private market forces, preventing foreclosures, skillfully managing city finances, and collaborating with city agencies and with partners in the private and nonprofit sectors.

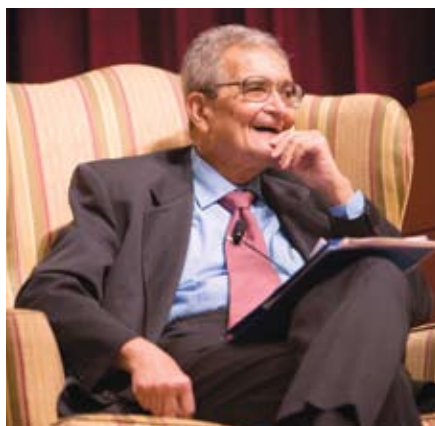
Bloomberg had a colorful response to those questioning the plan's viability: "Fuhgeddaboutit. We're not cutting back. We're not turning back. We're still on course to hit our affordable housing targets on time.... Some of us are old enough to remember what New York was like when the city seemed to hit bottom in the '70s. We saw what decades of housing abandonment and neglect did to our communities. And we're not about to let it happen again."

However, this plan does represent a "pivot" in the city's plans, said the mayor. Going forward, the city plans to preserve more units than it builds. The program now calls for the creation of 60,000 units and the preservation of 105,000 units, a near-reversal of the initial ratio. The new focus makes more sense, given economic realities, he said: "Today's slower market lets us employ policy tools that make preserving affordable housing attractive as well."

The speech introduced the new institute's daylong roundtable, co-hosted by the NYC Department of Housing Preservation and Development, on the opportunities for and challenges of affordable housing in the city. Vicki Been '83, Boxer Family Professor of Law and faculty director of the Furman Center, and Sarah Gerecke, the center's executive director, moderated panels on threats to multifamily housing units and on the challenges to housing affordability posed by the economic crisis.

NYU Law Trustee Ronald Moelis '82 and his wife, Kerry, provided funding for the Institute for Affordable Housing Policy. □

## On Justice and Happiness, a Philosopher Inaugurates Straus



A FIRESIDE CHAT WITH PHILOSOPHER Amartya Sen, the 1998 Nobel laureate in economics, was the main scholarly event at the inauguration last December of the Straus Institute for the Advanced Study of Law & Justice.

In a wide-ranging conversation, Sen and University Professor Joseph Weiler, director of the Straus Institute, discussed Sen's formative years and influences in India and England before turning to subjects such as how to measure people's well-being and the articulation of a grand theory of justice.

Regarding an individual's well-being, Sen said, "In social judgments, you don't only have to judge how an individual's life is going, but you have to compare disadvantages of people.... I've never seen happier people than somebody having a meal after starving for two weeks. It's a kind of indescribable happiness. But to say that that guy is better off than other people who are wondering whether they really like Aristotle or Plato would be to completely miss the signaling that happiness does."

In answer to a question about articulating a grand theory of justice, Sen said,

"I was questioning whether there could be a theory of justice with that degree of reach and ambition. One result of having a theory of justice that is so ambitious is to put a lot of issues out of the domain of justice altogether."

Earlier, in the newly renovated 1830s townhouse at 22 Washington Square North that the Straus Institute calls home, Weiler, Dean Richard Revesz, NYU President John Sexton, and Straus Institute benefactors Daniel Straus '81 and his wife, Joyce Straus, were on hand for the institute's official launch. Weiler spoke of the realization of "the possibility for fertile, creative, great minds to come from all over the world to share an intellectual and academic mission to think hard about issues of law and justice. My belief is that when creative and inspired minds think about law and justice... the world will be a better place." □



# Stuck in the Cold War Mindset

## Dominican Republic president critiques the United Nations.

**I**N A SEPTEMBER TALK CO-HOSTED BY the Institute for Policy Integrity and the Hauser Global Law School Program, Leonel Fernández, president of the Dominican Republic, said the U.N. and other global institutions are out of step with reality. At the end of World War II, when the U.N. was created, “the world was very simple,” he said. “You were a Communist or you were a capitalist.” But since then, four factors have irreversibly changed our world. Starting in the mid-1970s with the death of Spain’s Francisco Franco, and accelerating after the collapse of the Soviet Union, democratization has spread worldwide. Political, economic, and cultural globalization followed, resulting in such developments as the European Union. September 11, 2001, brought terrorism to the U.S., redefining how we think about security. And finally, the financial crisis—“the

consequence of a system of deregulation nationally in the United States and internationally in global financial institutions,” Fernández said—changed our economic order.

Some of the global institutions have undoubtedly evolved with the times, he noted. The World Trade Organization and the Group of 20, for example, give more economic power to developing countries than did their predecessor organizations. But the heads of both the International Monetary Fund and the World Bank are still European and American, respectively, even though the majority of their work targets the developing world. And the five permanent members of the U.N. Security Council,

selected in the Cold War era, aren’t representative enough. “There needs to be an overhaul of the system to make sense of the international reality that’s taking place in the 21st century,” Fernández said.

The president’s visit during United Nations Week also provided the NYU School of Law with the opportunity to strengthen its



ties to Fernández and his country. Fernández, who was honored with the designation of Distinguished Global Fellow, applauded a cooperation agreement intended to foster an exchange of ideas between the Law School and his development foundation, Fundación Global Democracia y Desarrollo. NYU Law students and faculty will study and teach at universities sponsored by the foundation, and vice versa. □

## Dignitaries and Discussions



**DANILO TÜRK**, president of the Republic of Slovenia, joined University Professor Joseph Weiler for a fireside chat at the Emile Noël Lecture last September. They discussed the politics of the European Union, including the extensive difficulties in ratifying its constitution. Türk also touched on Europe’s difficulties in absorbing immigrants.

Former Italian Prime Minister **GIULIANO AMATO** spoke about “The Lisbon Treaty and the Future of Europe” in Professor Eleanor Fox’s class, *European Union: Constitutional and Economic Law*. Amato led the effort to write the treaty, which went into effect in December 2009.



Bible Scholar **JAMES KUGEL** delivered the Caroline and Joseph S. Gruss Lecture, which also marked the inauguration of the Tikvah Center for Law & Jewish Civilization, describing how Judaism evolved its elaborate system of rules for the smallest details of ordinary life.



**PENNY WONG**, Australia’s Minister for Climate Change and Water, previewed Australia’s plan for an international political agreement to fight climate change that she would later present at the U.N. Climate Change Conference in Copenhagen.

## The Annual Report of Donors is now



## Support & Sustainability

Our 2010 Annual Report of Donors recognizes the continued support of our alumni and friends in the fiscal year that ended on August 31. The Law School is proud to promote environmental sustainability by publishing the report exclusively on our Web site.

Look for the 2010 Annual Report at [law.nyu.edu/arod2010](http://law.nyu.edu/arod2010).

"We allowed ourselves to become convinced of the infallibility of our financial models and forgot to apply sound business judgment and experience to model results."

GERALD ROSENFELD, DISTINGUISHED SCHOLAR  
IN RESIDENCE AND SENIOR LECTURER;  
CO-DIRECTOR, LEADERSHIP PROGRAM ON  
LAW AND BUSINESS

*"Ten Things We Learned from the Financial  
Crisis...Again"* OCTOBER 5, 2009

*"Although globalization is partly driven  
by changes in telecommunications and  
transport, it is above all driven by the  
political commitment to open trade and  
open markets.... To what extent is the  
banking crisis...a crisis for this kind of  
globalization that we've created?"*

LORD PETER MANDELSON, FIRST SECRETARY OF STATE, UNITED KINGDOM  
*"Is the Banking Crisis a Failure of Globalization?"* MARCH 3, 2010

# VOICES on the CRISIS

**"There needs to be a split in the sense of secrecy versus the normal regulatory role of the Federal Reserve or Treasury when it comes to financial crises. The price of not doing so, we're seeing it: It's anger, frustration, and cynicism. This could be one of most powerful long-term costs of this crisis."**

NEIL BAROFSKY '95, SPECIAL  
INSPECTOR GENERAL, TROUBLED  
ASSET RELIEF PROGRAM

The global financial meltdown continued to dominate events on the Law School's calendar in 2009-10 as prominent executives, government officials, and legal scholars met on campus to share their opinions on its causes, scrutinize existing and proposed policy and regulation, and speculate on the odds for a recurrence. Of particular interest, the November 5, 2009 Global Economic Policy Forum and Annual Alumni Fall Lecture moderated by Stuyvesant P. Comfort Professor of Law Geoffrey Miller showcased the thoughts of five prominent alumni and adjunct faculty with front-row seats to the spectacle. Notable remarks are excerpted at left and below.



For more on this event:  
[law.nyu.edu/2010mag/gepf](http://law.nyu.edu/2010mag/gepf)

**"When Bear Stearns failed... when Lehman Brothers was failing, actually those entities were not regulated as banks; they were completely free of the regulation of banks.... It was clear to us at the FDIC that we didn't have the tools to successfully deal with the failure of one of those entities."**

SARA KELSEY '76, FORMER GENERAL  
COUNSEL, FEDERAL DEPOSIT  
INSURANCE CORPORATION

**"Whether or not the marketplace will voluntarily pick up on the structure of how we determine compensation remains to be seen. The structure—the conditions for earning compensation—is more important than the dollars themselves."**

KENNETH FEINBERG '70,  
ADJUNCT PROFESSOR OF LAW;  
SPECIAL MASTER OF  
EXECUTIVE COMPENSATION  
UNDER TARP

**"We in fact have no theory of 'too big to fail.' We have no coherent rationale, and we have no process.... What is the rationale by which we bail out institutions?"**

ROBERT POZEN, CHAIRMAN  
EMERITUS, MFS INVESTMENT  
MANAGEMENT

*"U.S. Financial Regulation After  
the Crisis"* JANUARY 28, 2010

**"One argument is you let things fail and fall where they may. I don't think this country can handle the repercussions of this."**

ALAN RECHTSCHAFFEN, ADJUNCT  
PROFESSOR OF LAW; HEAD OF THE  
RECHTSCHAFFEN GROUP

**"Historically, we have had laws which prohibited speculation in uncapitalized financial products. And then you took down the walls...which meant you could take a core depository and bolt on a leverage-taking institution, which is exactly what our forefathers and foremothers had worried about and prohibited with Glass-Steagall."**

ERIC DINALLO '90, FORMER NEW YORK  
STATE SUPERINTENDENT OF INSURANCE



"[The bailout of U.S. automakers] really was a perversion of the bankruptcy process and a demonstration of the power of the government... I have to admire the audacity of the thing."

**SANDER ESSERMAN, PARTNER, STUTZMAN, BROMBERG, ESSERMAN & PLIFKA**

*"Is What's Good for GM Good for America?"* JANUARY 21, 2010

"It isn't very likely...that we're actually going to eliminate bubbles, manias, and crashes.... Markets are susceptible to bubbles, and the real key is to try to minimize their impact, minimize the damage that they do, and manage them going forward."

**JOHN THAIN, CHAIRMAN AND CEO, CIT GROUP; FORMER CHAIRMAN AND CEO, MERRILL LYNCH**

*"Corporate Governance: Responding to New Challenges"* MAY 7, 2010

*"The financial capital of the United States has moved from New York to Washington."*

**GEOFFREY MILLER, STUYVESANT P. COMFORT PROFESSOR OF LAW; DIRECTOR, CENTER FOR THE STUDY OF CENTRAL BANKS AND FINANCIAL INSTITUTIONS**

*"After the Fall: How Should Financial Institutions Be Regulated?"* JANUARY 27, 2010



Nagl and McFate

## Winning the Counterinsurgency

**Military experts assess the nation's efforts in Afghanistan.**

**T**HE CENTER ON LAW AND SECURITY'S November conference, "Counterinsurgency: America's Strategic Burden," featured several military experts who wrote the book on counterinsurgency.

During the "Counterinsurgency Today: Theory vs. Reality" panel, Conrad Crane, director of the U.S. Army Military History Institute, recalled the November 2005 day when David Petraeus, who would later lead the U.S. troops in Iraq, asked him to take a leading role in writing a new counterinsurgency manual. A joint effort of the Army and the Marine Corps, *Counterinsurgency* was the first field manual created through close collaboration of the two military branches. Other contributors, including retired Lieutenant Colonel John Nagl, president of the Center for a New American Security, and Montgomery McFate, senior social scientist for the Army's Human Terrain System, a program that embeds anthropologists and other social scientists in combat brigades in Iraq and Afghanistan to help the military better understand local populations and cultures, participated in the panel.

Given that the entire project unfolded in less than a year, Crane said, the finished product was not perfect. He pointed out the weaknesses—the need for a better definition of irregular warfare, for instance—but also touched on the strengths of the manual's counterinsurgency doctrine, such as its emphasis on the importance of sociocultural intelligence: "In this type of war, perception is more important than reality. It's not what you've done, it's what people think you've done that's most important."

The perception of the experts at "Lessons from the Past: Counterinsurgency in History," another of the day's panels, was

that the U.S. is making mistakes in Afghanistan. Thomas Johnson, director of the Program for Culture & Conflict Studies at the Naval Postgraduate School, made an extensive comparison between the conflicts in Vietnam and Afghanistan. He argued that the U.S. lost the former because it failed to establish the legitimacy of its favored government and because it pursued a war of attrition instead of successfully protecting and isolating the general population from insurgents. "The lack of self-awareness of this repetition of events 50 years ago I find deeply disturbing," said Johnson.

Recalling how counterinsurgency efforts waxed and waned over the course of the Vietnam War, retired Colonel W. Patrick Lang said he is chiefly concerned about the U.S. public's will to increase forces. And retired Colonel Martin Stanton, senior analyst for the Afghanistan-Pakistan Intelligence Center of Excellence at the U.S. Central Command, saw the lack of clear objectives as the primary obstacle to winning Afghanistan: "We are having a real problem as a nation developing strategic leaders that can look at something and see it for what it is.... Ambiguity...is just killing us."

Michael Sheehan, former U.S. ambassador-at-large for counterterrorism, seemed to agree. He took issue with General Stanley McChrystal's report calling for more troops in Afghanistan: "The question it answers is how we win an insurgency. That's not the question. The question goes back to our initial purpose of why we're in Afghanistan: to prevent another strategic terrorist attack within our borders or other national interests around the country. And in that regard, for the past eight years, we've been enormously successful." □

# Facebook for the Founders

**W**HEN JUDGE M. BLANE MICHAEL '68 of the U.S. Court of Appeals for the Fourth Circuit delivered the 41st annual James Madison Lecture in October, his talk boiled down to one timely question: "Can the Fourth Amendment, designed in the musty age of paper, offer meaningful privacy protection for personal electronic data?"

Yes, Michael argued. Technological advances have made our personal information

The deep personal-liberty concerns that gave rise to the Fourth Amendment, Michael said, are not addressed by a methodology championed by Justice Antonin Scalia; under what Michael called this "frozen-common-law approach," a judge looks to the common law in place at the time of the amendment's ratification to determine the reasonableness of a search. This approach, Michael said, offers little guidance for applying 1780s rules in the digital age.

Further, the amendment makes no reference to common-law rules, and the essential evolutionary nature of common law contradicts the idea of freezing it in the 18th century.

For contemporary problems such as murky privacy standards for personal online files, broadly executed computer search warrants, and intrusive government

data-mining programs, Michael argued that the context of the Fourth Amendment's drafting could offer guidance. The "secret cabinets and bureaus" protecting personal papers, referenced by a lawyer in a 1765 search-and-seizure case that is part of the amendment's formative history, are today's remote e-mail servers, he said. "The mischief—the threat to liberty and privacy—that led to the inclusion of the Fourth Amendment in the Bill of Rights has not disappeared," Michael concluded. "It has only changed in form." □



increasingly vulnerable to intrusive acts by the government. In determining whether the Fourth Amendment, which protects citizens against unreasonable searches and seizures, applies to such thorny issues as search warrants for e-mail stored on a remote server, Michael said, the formative history of the law should be considered. The pre-history of the Fourth Amendment, written after decades of search-and-seizure abuses, indicated that the amendment's broader purpose is to, in his words, "circumscribe government discretion."

## Counting Asian American Jurists

FOR JUDGE KIYO MATSUMOTO OF THE U.S. District Court for the Eastern District of New York, seconds count. Born to second-generation Japanese-American parents, she is the second Asian-American woman to serve as a federal district court judge. Delivering the 11th annual Korematsu Lecture in March, Matsumoto pointed out that only 17 Asian-American Article III judges had ever been confirmed when she joined the bench two years ago.

She recalled her relevant family history—her parents and grandparents were interned during World War II, and afterward her parents faced discrimination in California when finding a home.



When Matsumoto decided to pursue a legal career, she remembered her parents' noting that there had been few Asian American lawyers to fight the internment policy. Matsumoto spent 20 years as an assistant U.S. attorney for the Eastern District of New York and four years as a U.S. magistrate judge. She also taught the Government Civil Litigation Clinic and seminar at the Law School.

Only two Asian Americans have joined Matsumoto on the federal bench since 2008. "There's obviously much to be done and that's evident in the labels that we continue to use—'the first,' or 'the second,' or 'the only,'" she said. "That will change, I hope, at some point in the near future." □



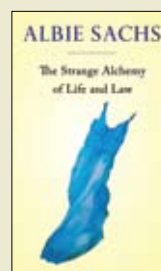
## A Trial for the Ages

NIGEL LI WAS CONVINCED THAT THE TRIAL of Chen Shui-bian, ex-president of Taiwan, set a milestone in the young democracy's transition to the rule of law. "In traditional Confucian thinking, the president carries a lifelong mandate from heaven," said Li, CEO of the Taipei law firm Lee and Li, at the October Timothy A. Gelatt Dialogue on the Rule of Law in Asia. "The fact that an ex-president must face justice signifies how far Taiwan has progressed."

The trial for embezzlement and other offenses was the most spectacular in the island's history, said Professor Jerome Cohen, co-director of the NYU School of Law's U.S.-Asia Law Institute, which hosted the event. A Taipei district court convicted Chen, sentencing him and his wife to life imprisonment. (In June, the Taiwan High Court cut the sentences to 20 years each.)

There had been allegations of irregularities in the proceedings, such as the replacement of a sympathetic judge, and prolonged pretrial detention. "A lot of people in Taiwan believe Chen Shui-bian is corrupt, but they also think he did not get fair procedural treatment," said Wang Jaw-Perng of National Taiwan University.

The case, said Cohen, had an impact well beyond the former first family. The Taiwanese people, he said, must find common trust in law and the rule of law. Li agreed: "I hoped Chen would receive a fair trial not as an emperor nor as an enemy of state." □



**ALBIE SACHS**, former justice of the South African Constitutional Court, discussed his new book last January. Part judicial autobiography, the book pairs personal narratives with judgments Sachs authored during his

15 years on the bench to demonstrate how unique life experiences may affect rulings.



# Divining the Roberts Era

What may be in store after *Citizens United* and a new justice.

**J**UST HOW “SUPREME” IS THE SUPREME Court? A week before the start of Elena Kagan’s June confirmation hearings, experts discussed judicial activism and the Roberts Court in an event sponsored by NYU School of Law’s Brennan Center for Justice, Alliance for Justice, and the American Constitution Society.

Former White House speechwriter Jeff Shesol took the long view. He described how the Court clashed with FDR, who famously responded by trying to expand the number of justices. He asserted that the Court has been conservatively “activist” for decades.

Barry Friedman, Jacob D. Fuchsberg Professor of Law, said the Roberts Court is “genius at understanding that it is ultimately accountable to public opinion and plays public opinion exceedingly well.” The Court made a rare misreading of its constituents, he



said, when Americans, reacting negatively to its ruling in *Citizens United*, charged the Court with judicial activism. For the most part, he added, the current Court moves “very far to the right very fast” but does so in “very subtle, careful ways,” doing such things as limiting who can actually get to trial and claiming not to be overruling cases when it effectively is.

Jan Crawford, CBS News chief legal correspondent, reflected on how the expected Kagan confirmation might change the Court. “Some people have been disappointed that she’s not liberal enough, but...you can see that she could be quite an effective justice on that Court in building coalitions and having some sway with some of those wavering justices, like [Anthony] Kennedy,” she said. “What’s important to keep in mind is how a new justice can change things around.” □



## When One Blocks a Majority

**T**HE SENATE FILIBUSTER, IN WHICH A senator can delay most types of legislation indefinitely until there are 60 votes to end debate, is a “tyranny of the minority,” said Senator Tom Harkin at the Brennan Center for Justice’s Living Constitution Lecture in June. “The harsh reality today is that, in critical areas of public policy, our Congress is simply unable to respond effectively to the challenges,” he said, naming a few of the major issues that the Senate has tried and failed to address: climate change and energy policy, labor law reform, and immigration reform.

Harkin has been a voice for filibuster reform since 1995, when he was a member of the minority party and thus had the most to lose from a weakened filibuster. He proposes gradually reducing the number of votes required for cloture from 60 to

a simple majority over a period not to exceed eight days. “It is about the Senate as an institution operating more fairly, effectively, and democratically,” he noted.

The Living Constitution Lecture gives a platform to public officials who have considered the Constitution’s great principles in the course of their work. Last November, Senator Sheldon Whitehouse offered a wide-ranging, progressive interpretation of the Constitution. A member of the Judiciary and Intelligence committees, he warned of grave threats to the Constitution including corporate influence in campaigns and efforts to erode the right to a jury trial. The senator also criticized government’s efforts to rein in executive compensation without due process as a dangerous precedent, no matter how unpopular financial industry executives might seem today. □



## From Bench to Hot Seat

After casting votes on two critical cases involving same-sex marriage, Roderick Ireland, senior associate justice of the Massachusetts Supreme Judicial Court, has a new appreciation for the challenges judges face during and after such high-profile and controversial work. He shared his experiences at the 16th annual William J. Brennan Jr. Lecture on State Courts and Social Justice in March.

In 2003, Ireland, who in 1997 became the first African American appointed to the Massachusetts court, sided with the 4-3 majority in *Goodridge v. Department of Public Health*, which held that barring same-sex marriages violated the state’s constitution. Three years later, he was the lone dissenter in *Cote-Whitacre v. Department of Public Health*, in which the 6-1 majority upheld a 1913 law that barred non-state residents from marrying in Massachusetts if their home state would not honor the marriage.

Public attention followed Ireland beyond the courtroom. “From the time that people became aware that *Goodridge* was going to be argued before our court, many, many, many people felt free to tell me what they thought,” Ireland said. After that decision, Ireland and his fellow justices received a flood of feedback, both positive and negative. “We received death threats, and public reaction was not limited to just those in Massachusetts,” Ireland said. “We and our decision were called every name imaginable.”

To persevere, Ireland held onto the principles that have guided him: impartiality regarding public opinion and politics, a commitment to the law and the court, and the resolve to move on once a decision is reached. “No matter how difficult the case, how controversial the issue, and how intense the scrutiny of the media,” Ireland said, “the integrity of the court as an institution must remain a judge’s paramount concern.” □

## It's Criminal



Following a promising inaugural year, the Center on the Administration of Criminal Law continued to draw prominent prosecu-

tors and powerful elected officials to engage in hot-button questions of the day. In November, **PREET BHARARA**, then-newly confirmed U.S. attorney for the Southern District of New York, discussed the ever-changing face and scope of white collar crime, and his office's increasingly high-tech efforts to pursue it. "You can expect us to use, when warranted, all the legal authority available to monitor criminal activity taking place on the Internet, to trace and identify the perpetrators, and to keep our financial systems and accounts secure."



In April, the center explored the allocation of prosecutorial power with three panels covering competition between prosecu-

tors, rivalries between law enforcement agencies, and whether strongly centralized authority is necessary or effective. Keynote speaker **PATRICK J. FITZGERALD**, U.S. Attorney for the Northern District of Illinois, confronted the turf wars between local, state, and federal prosecutors: "If we step back from the emotions of everyone wanting to make sure that their component plays a role, and look at it from a citizen's point of view, what we ought to be doing is a careful analysis of what value is added by the field versus main Justice, and setting the levers so that the component that adds the most value has more charge."



Representative **JOHN CONYERS JR.** of Michigan, chairman of the House Judiciary Committee, headlined a panel discussion in

May that focused on non-violent drug sentencing disparities and changes in sentencing policy. "The criminal justice system is a very sensitive subject," Conyers said. "It is the one area of the Committee on the Judiciary's jurisdiction, excluding the corrections system itself, that is most in need of reform."



Cuomo and Abrams

## A Case for Public Service

Cuomo asks "What else could you want to do with your life?"

**A**TTORNEY GENERAL OF NEW YORK Andrew Cuomo (now Democratic candidate for governor of the state), showed both candor and self-deprecating humor last September when he delivered the 13th annual Attorney General Robert Abrams Public Service Lecture, "Pursuing Public Service," sponsored by the Public Interest Law Center and Law Democrats.

Former New York Attorney General Robert Abrams '63, who has worked with Cuomo for more than two decades and served as chair of the transition committee when Cuomo became attorney general, introduced Cuomo. He recounted a litany of public service positions that Cuomo has held—lawyer in the Manhattan District Attorney's Office; policy adviser to his father, then-Governor Mario Cuomo; founder of Housing Enterprise for the Less Privileged; and U.S. secretary of housing and urban development during the Clinton administration—prompting Cuomo to joke, "I've had

a number of positions during my career... because I can't hold a job."

Cuomo quickly adopted a more somber tone, however, as he described the rewards of a public service career. When Cuomo was HUD secretary, Bill Clinton told him that working as an attorney general is the purest form of public service. "I understand now what he meant," Cuomo said. The mandate of the office, he noted, is to "make this society a more just society, and use the body of law as a powerful sword and a powerful shield on behalf of the people of the State of New York. Beautiful! What else could you want to do with your life?"

Urging the audience of NYU School of Law students to consider a public service path, Cuomo said: "The decisions we are making in government today will decide the trajectory of this nation and this state for years to come, possibly for the rest of your adult life. I believe that's how profound these discussions are." □

## A Vow to Fight Poverty

In "Affluence and International Human Rights Law," co-hosted by the Center for Human Rights and Global Justice and the International Institute for Law and Justice, Margot Salomon of the London School of Economics argued that the international human rights community has failed to address poverty. The prevailing economic orthodoxy views inequality as an "incentivizing force" and part of the free market, she said, rather than a violation of human rights. She advocated for a renewed focus on access to power, redistribution of wealth, and reallocation of scarce resources.





# Preventing African Genocide

**E**NDING GENOCIDE IS A DAUNTING task, but it is a mission the world cannot shrink from. That was the message from Francis Deng, the U.N. secretary-general's special adviser on the prevention of genocide, in an October lecture. "The critical factor is to not make genocide such a forbidden word, a sensitive issue to be avoided," said Deng. "It's something we can deal with through structural prevention."

The first Southern Sudanese to earn a doctorate in any field, Deng has served as U.N. representative on internally displaced persons, Sudan's minister of state for foreign affairs, and Sudanese ambassador to the U.S., among other countries. He has been a senior fellow at the Brookings Institution, where he founded the Africa Project, and a professor at Johns Hopkins University School of Advanced International Studies and the City University of New York.

In introducing Deng's lecture, "Managing Identity Conflicts in Africa," Ryan

Goodman, Anne and Joel Ehrenkranz Professor of Law and faculty director and co-chair of the Center for Human Rights and Global Justice, called Deng "one of the most important voices on the issues he confronts."

Deng noted that the end of the Cold War altered the perception of African conflicts, which had been seen as proxy wars between superpowers. Since then, responsibility for national conflicts has fallen more squarely on individual countries and regional authorities. Human rights have become a primary concern of international bodies, who now intervene if governments don't address their own human rights dilemmas.

In his work on displaced persons for the U.N., Deng saw how the notion of sovereignty could be a double-edged sword: Nations plagued by internal strife often cited it as a shield against outside intervention. But true sovereignty, Deng argued, involves real responsibility to citizens, including conscientious efforts to protect them. □



## Interest Groups That Pose a Threat

IN THE FIFTH ANNUAL FRIEDRICH A. VON Hayek Lecture, Judge Stephen Williams of the U.S. Court of Appeals for the District of Columbia Circuit argued that although interest groups are crucial players in a free-market liberal democracy, overly powerful ones can undermine that societal structure.

In the November lecture, "Transitions Into—and Out of—Liberal Democracy," Williams asserted that a society can become a liberal democracy with private property and rule of law "only if producer groups can organize and exert enough influence to prevent government predation." But, he added, such groups could also become powerful enough "to mobilize government for predation against others. The resultant rent-seeking society may hollow out liberal democracy to a barely recognizable shell."

Williams noted that today's public loathing of lobbyists could be seen as evidence of revulsion against rent seeking—a term that describes efforts to obtain gains greater than what one has contributed to a society through manipulation of the economic environment. He prefers broadly encompassing interest groups for that reason—say, the AFL-CIO over the UAW. Yet, he said, the distrust of special-interest players fails to distinguish between those "engaged in purely defensive activity...and those engaged in rent-seeking aggression."

Given the difficulty in making that distinction, a judicial doctrine to address rent seeking would likely be untenable. "Either the public will develop a nose to sniff out rent seeking, or it will not," he said.

Developing that sense, Williams suggested, would entail changes in the media's coverage of policy arguments and a stronger economics component in the high-school curriculum. "We should not see rent seeking as a mere wart on the body politic," he said. "It is a fundamental and perhaps fatal disease." □

## Grading the Nation on Human Rights

A DAY AFTER THE STATE DEPARTMENT released its annual Country Reports on Human Rights Practices, Michael Posner, assistant secretary of state for democracy, human rights, and labor, headlined a March discussion on trends in human rights, sponsored by the Center for Human Rights and Global Justice, Institute for International Law and Justice, and the Hauser Global Law School Program.

Posner, who was founding executive director of Human Rights First, described the extraordinary scope and depth of the reports. Speaking with unusual candor, he also acknowledged shortcomings in both the reports and certain U.S. policies. And he noted that despite a change in

administrations, the atmosphere for promoting human rights remains difficult in



the U.S. because of national security concerns. "I was stunned about how intense the politics of fear were and how much it has resurfaced," he said.

Joining Posner on the panel were Larry Cox, executive director of Amnesty International USA, and John Norton Pomeroy Professor of Law Philip Alston, who was then U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. □

# Nurturing Green Growth

**A**NTHONY “VAN” JONES IS AN ARDENT social entrepreneur. Rather than focusing on money, “Van’s creativity, energy, passion, and vision have been directed toward a different kind of capital: the vast storehouse of human capacity, potential, and love,” said Gara LaMarche, president and CEO of Atlantic Philanthropies, introducing Jones at the Rose Sheinberg Lecture last April.

Now a senior fellow at the Center for American Progress and former “green jobs czar”—special adviser for green jobs, enterprise, and innovation at the White House Council on Environmental Quality—Jones proposed changes to help our economy and the environment.

In the late 20th century, the American economy moved too far toward imports and consumption, Jones said. “The icon of the American economy went from being the factory to the mall.” He suggested the U.S. should promote wind and solar energy and encourage manufacturers of green technologies instead: “Why don’t we turn the heartland’s Rust Belt,” he asked, “into a Green Belt?”

He also called for stricter pollution laws: “If we are going to live up to our patriotic duty to

defend America’s beauty, we need carbon reduction and a climate bill that lets us have that outcome.”

Jones got his start as an urban youth advocate in Oakland, California in the 1990s, when he co-founded the Ella Baker Center for Human Rights. He became focused on the environment when he noticed the disparities between Oakland and the towns in its wealthy, park-filled neighbor to the north, Marin County. “Why do I have to drive all the way over here for this?” Jones recalled asking. “Why don’t we have clean air” and access to healthy food and good jobs?

In 2005, Jones launched the Green-Collar Jobs Campaign through the Ella Baker Center, and began traveling the nation, campaigning for jobs that preserve or restore our environment as a means to fight incarceration and poverty.

After the global economy collapsed, Jones said, “the work I was doing to try to grow a part of our economy in a green direction suddenly became much more important.” □



## Foreign Tax Havens Not Welcome Here

WITH THE U.S. PUBLIC DEBT REACHING epic heights, what better time to step up tax collections? But as Pulitzer Prize-winning journalist David Cay Johnston argued at the 14th Annual David R. Tillinghast Lecture on International Taxation, that expectation is unrealistic. In his September lecture, “Faux Firms and Fairness: Taxing Capital, Trade, and Production in a Global Economy,” Johnston said our government acquiesces to self-dealing and foreign tax havens that subvert tax collection efforts.

Johnston won the Pulitzer Prize in 2001 for his *New York Times* reporting on inequities in the U.S. tax code and is now a distinguished visiting lecturer at Syracuse University College of Law. He criticized foreign tax havens, such as, famously, the Cayman Islands, for facilitating tax law abuses. Among the laundry list of the Islands’ transgressions: Approximately 80,000 businesses are licensed in the Cayman Islands, yet precious few operate there.

But Johnston threw his heaviest punches at multinational corporations that are able to use their global reach to exploit the tax system. With 60 percent of world trade occurring within corporations, he said, transactions between related companies are especially prone to abuse. For instance, prices used in deals between parent companies and their foreign subsidiaries may fail to reflect market rates, enabling a multinational to allocate taxable income to tax-friendly jurisdictions. Although the Internal Revenue Service’s Advance Pricing Agreement Program is supposed to promote better oversight of these types of deals, it fails to. The process, Johnston says, is broken. “These are backroom deals, agreements carried out with no ability, normally, for the public to see what is going on.”

That, Johnston says, “is an offense to the very idea of the founding of the United States of America.” □

## Race and Predatory Subprime Lending



EMMA COLEMAN JORDAN OF GEORGETOWN University Law Center entwined race relations and the subprime mortgage crisis last November when she presented the Derrick Bell Lecture on Race in American Society.

In “Race and the New Economic Connection in the Subprime Crisis: A Paradox of Individualism and Community,” Jordan explained minority susceptibility to

predatory lenders: “From the end of the Civil War...the psychic dividing line between slavery and freedom has been ownership of land.” She pointed to the predominantly black Williamsbridge section of the Bronx, in which half of its mortgages were subprime. With “block after block of broken windows and abandoned homes,” she said, residents “found that the community and their individual identities were, in fact, erased by these losses.”

The holders of these subprime mortgages have legitimate claims, Jordan said. “The [lenders’] bonuses are defended as contracts. The securitization agreements are defended as contracts. And I tell you that we do have tools in the toolkit of the common law that can help us listen to the justice claims of our communities.... These claims are claims that deserve to be heard; they can be heard.” □





THANK YOU



## Alumni Almanac

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Capping Off the Capital Campaign | 110  
Charlotte, NC, Elects Foxx '96 | 112  
Hanging Out a Shingle in Kabul | 113  
Congressman Nadler on Civil Liberties | 114  
Leaving Big Law to Help in Rwanda | 114  
Solicitor Smith '77: Alumna of the Year | 115  
Adams '65 Wants to Prevent the Flu | 116  
2010 Law School Reunion in Photos | 117  
Justice Ginsburg Memorializes Cary '71 | 118

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Trustee Kenneth Raisler '76 and Vice Dean Jeannie Forrest graciously acknowledge the contributions of Weinfeld Gala guests toward achieving NYU Law's successful \$415 million capital campaign.

# Standing On Top— and Savoring Success

Guests at the spring-themed 2010 Weinfeld Gala celebrate the Law School's monumental \$415 million capital campaign.

**T**HE NYU SCHOOL OF LAW'S CAPITAL campaign, "Where We Stand," which was launched in 2002 and publicly kicked off at the 2005 Weinfeld Gala, wrapped up with an exuberant 2010 gala on March 1 at the New York Public Library's main branch on Fifth Avenue.

More than 400 guests convened in the library's august rooms to celebrate the Law School's achievement in raising \$415,064,515 to fund student scholarships and public interest work, increase the number of faculty and chaired professorships, and support faculty-run centers and institutes. The Law School also succeeded in doubling its annual fund between 2002

(when it raised \$3.1 million) and 2009 (when it raised \$6.2 million), thanks to the seven-year effort that emphasized opportunity, community, and leadership.

Attaining such ambitious fundraising goals despite a recession and a historic bear market lent the festivities a victorious air. A jazz band serenaded attendees as they passed the library's iconic stone lions to ascend the stately staircase—carpeted in violet for the occasion. In Astor Hall for the cocktail hour, the curious could look up at vintage black-and-white photographs of the Law School's past projected on the ceiling. Hydrangeas festooned the hallway leading to the

dinner hall, where green tablecloths and orchid, lily, and rose centerpieces played up a spring theme.

Several speakers took the stage to note the importance of the occasion and to deliver a clear message of gratitude to the donors as well as the campaign staff and leadership. Dean Richard Revesz reflected on the ambitious campaign in his remarks: "Many thought, \$400 million—Is that possible? Could we do it? Are we crazy? The answer to all three of those questions is a resounding 'yes.' I stand here before you today to announce that we did it. You did it. Our campaign raised more dollars per year than any other law school campaign ever. Thank you! Our Law School community is over 40,000 strong, spread across six continents, and if I could, I would thank each and every member of our community personally."

Revesz gratefully acknowledged Jeannie Forrest, then-associate dean for development and alumni relations. She invited Sullivan & Cromwell partner Kenneth Raisler '76, vice chair of the campaign steering committee, to join her at the lectern.



CAMPAIGN WISHES 1 Dean Richard Revesz announcing the official campaign total; 2 Jerome Kern '60 and Thomas Brome '67; 3 Evan Chesler '75, Barbara Chesler, and George Lowy '55; 4 Robyn Fuchsberg and Alan Fuchsberg '79; 5 Victoria Moran and Jay Furman '71; 6 the main branch of the New York Public Library, awash in violet; 7 Board Chairman Anthony Welters '77 and immediate past chairman Lester Pollack '57; 8 Leonard Boxer '63 and Leonard Wilf (LL.M. '77).





Raising \$400 million, Forrest said, fell into a category the corporate world calls “big HAGs,” or “hairy, audacious goals.” Recalling that when she came to NYU Law she had been daunted by the task, Forrest remarked of the dean, “I’m thankful he saw through me to the possibilities. His reply personified his approach: ‘I need you to start today.’”

She also credited Revesz for his leadership throughout the campaign, describing how he “impressed the heck out of prospects with his big ideas and vast knowledge of the Law School and huge faith in the institution.”

Raisler spoke to the campaign’s broader goals: “Our intent was not simply to raise money. Our intent was to make a legitimate difference in the fabric of legal education and guide this law school’s upward trajectory.” To illustrate the campaign’s success in that area, Forrest and Raisler recounted the stories of four students whose lives were changed by NYU Law professors. They capped off their speeches by introducing a “thank-you” video featuring members of the Law School community.

The evening concluded with remarks from Board of Trustees Chairman Anthony Walters ’77, who was also chair of the campaign steering committee. Thanking the committee’s vice chairs—Raisler, Florence Davis ’79, Wayne Perry (LL.M. ’76), and Eileen Sudler ’74—Walters said, “Our sights were high, our campaign team indomitable, and this great institution’s alumni the most generous in the world.” Walters also acknowledged the leadership of Lester Pollack ’57, who was chairman of the board when the campaign began.

Walters spoke of the economic downturn as “a period when people were focused on protecting their resources, limiting their commitments, and hunkering down for the long haul.” He added: “We are fortunate to have trustees who said there is something more important than hunkering down.... [NYU School of Law] is a global community...[that] has come together to accomplish some extraordinary initiatives. A community that believes it can make a difference in the daily lives of real people across the globe.” □ *Atticus Gannaway*

## New Trustees

The NYU School of Law Board of Trustees welcomed four new members.

One of just 20 women in her class, **Stephanie Abramson ’69** has long been a role model for women in the legal profession. As executive vice president and general counsel of DoubleClick, she was lead lawyer in the company’s 2008 sale to Google. During her tenure as general counsel of Young & Rubicam, she oversaw its eventual sale in 2000. Currently in private practice, Abramson is a frequent lecturer and adviser to boards.

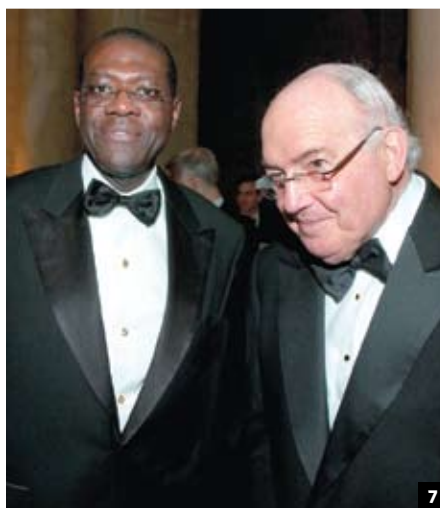
**David Boies (LL.M. ’67)** is chairman of Boies, Schiller & Flexner and one of the most renowned trial attorneys in the country. Boies famously represented Al Gore in *Bush v. Gore* before the Supreme Court, and was special trial counsel in the successfully prosecuted antitrust case *United States v. Microsoft*. He is currently challenging California’s Proposition 8, which forbids gay marriage. Boies served as chief counsel and staff director to both the Senate Antitrust Subcommittee and the Senate Judiciary Committee in the 1970s, and as counsel to the Federal Deposit Insurance Corporation in the 1990s. This year, Boies funded the David Boies Professorship of Law.

**Stephen Kaplan ’83** is the co-founder of Oaktree Capital Management and head of its Principal Group, which manages more than \$11.6 billion in assets. Before starting Oaktree in 1995, he was managing director at the investment management firm TCW and a partner with the law firm of Gibson, Dunn & Crutcher, where he led the East Coast bankruptcy and workout practice. He also serves on the board of trustees of the Jonsson Cancer Center Foundation of the David Geffen School of Medicine at UCLA.

As executive vice president and general counsel of Verizon Communications, **Randal Milch ’85** leads the company’s legal, regulatory, and security groups. Since launching his telecommunications career in 1993 at Bell Atlantic-Maryland, he has held numerous posts at Bell Atlantic and Verizon, the company that emerged from Bell Atlantic’s 2000 merger with GTE. Milch began his legal career as a clerk for Clement Haynsworth Jr., chief judge emeritus of the U.S. Court of Appeals for the Fourth Circuit.



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## Born to Run, Raised to Lead

**Anthony Foxx '96, Charlotte's charismatic new mayor, has been preparing for this job all his life.**

**A**NTHONY FOXX '96 WAS WEANED on politics. From an early age, he helped make election signs after school. Politics permeated the family dinner discussions, and aspiring politicians called at the house in search of advice from his maternal grandfather, an elder statesman of Charlotte, NC, politics. Foxx and his mother, Laura—a single college student when her son was born—lived with her parents: Mary, now 93 and a retired French teacher, and the late James Foxx Sr., a former educator who was a behind-the-scenes political strategist and tireless party worker. “Anthony grew up at his feet,” says Harvey Gantt, a family friend and former Charlotte mayor.

Last November, Foxx fulfilled his grandfather's legacy. Just four years after winning a seat on the city council, he was elected mayor of Charlotte, electrifying a city that had been governed by the same mayor since 1995. At 38, Foxx became the city's youngest mayor and the second African American on the job (Gantt was the first). With his election he also became the first Democrat to hold the part-time office since 1987. “It's been 22 years since we've had this moment,” Foxx told a cheering crowd after the votes came in. “We will work together—

Republicans, Democrats, and unaffiliated; white and black and Hispanic.”

In an election that centered on the economy and jobs (Charlotte's 13 percent unemployment rate is well above the 9.7 percent national average), Foxx positioned himself as the candidate of change, a young leader with a collaborative style, adept at uniting a diverse community. Winning 30 predominantly white, Republican-leaning precincts, Foxx was likened to President Obama. “He's got Obama's ability to move comfortably in different worlds and bring people together,” says Jeff Michael, director of the UNC Charlotte Urban Institute. Even Andy Dulin, a Republican on the council, praises Foxx: “He's got relationship-building abilities, and he's got that big smile that puts people at ease.”

Foxx has long known something about moving between different worlds. Although his family was not affluent, he grew up surrounded by influential local African American civil rights leaders—family friends include Gantt, U.S. Congressman Mel Watt, and civil rights attorney James Ferguson II. “He's like my second brother,” says Watt's son Jason, who celebrates Christmas each year with Foxx and his mom. Then Foxx's education broadened his horizons.

He attended West Charlotte High, a once all-African-American school that became a model of successful integration. “It was a place where the wealthiest white residents sent their kids to sit right alongside middle-class and poor African American kids,” says Foxx. That experience made him comfortable with people of different races and economic circumstances. “I didn't live my childhood with the walls of separation that my mom and grandparents knew. I didn't see a wide gulf between people,” Foxx says. “It gives me the ability to lead differently.”

At Davidson College, Foxx, one of just 68 black students, was elected student council president. “He connected with the students. They respected him and felt that he could look out for a broad range of people,” explains Ferguson's son Jay, who co-wrote a college newspaper column with Foxx.

Graduating from Davidson in 1993 with dreams of becoming a civil rights lawyer, Foxx chose NYU Law. “There was no close second,” says Foxx, a Root-Tilden Scholar. “NYU had a strong footprint in honing public interest lawyers.” Through Professor Randy Hertz's Juvenile Defender Clinic, he had the opportunity to represent troubled youth at the Family Court in Brooklyn. “He had a real commitment to tackle and reform injustices of all sorts,” says Hertz, “especially those that affected powerless and disadvantaged people.”

Foxx went on to work in every branch of the federal government. He served as a law clerk for Judge Nathaniel Jones of the U.S. Court of Appeals for the Sixth Circuit, a trial attorney for the Civil Rights Division of the Justice Department during the Clinton administration, and a staff counsel to the House Judiciary Committee. There, he met his wife, Samara, an attorney. He wooed her with the one song he knew how to play on the trumpet. “He was not a bit musical. But if he gets an idea that he thinks is a good one, he'll take a chance,” says the elder Ferguson, explaining how Foxx traveled to New Orleans to learn the instrument. The couple now has two children: Hillary, 6, and Zachary, 4.

As a part-time mayor with limited powers, Foxx plays a largely agenda-setting role. (He continues in his job as deputy general counsel for DesignLine Corp., a hybrid bus manufacturer.) He intends to use his bully pulpit to improve the public school system and to stimulate the ailing economy. The public and private sectors are in flux, he says. “The tough thing about leading right now is that you've got to shape the ‘new normal,’” says Foxx. “But that's also the opportunity.” □ *Jennifer Frey*



## Community Developer


Law School Trustee Ronald Moelis '82 has played a major role in creating affordable housing in New York City for a quarter decade. Last April, the NYU School of Law chapter of the Order of the Coif recognized him for his contribution to the Law School and the community with an honorary induction.

A member of the Furman Center for Real Estate and Urban Policy's advisory board, "Ron sees opportunities where others see challenges," said Dean Richard Revesz. "In the face of the housing crisis, he established the Furman Center's Institute for Affordable Housing Policy. Its objectives align with Ron's ideals—the power of rigorous analysis, the dissemination of new ideas, and dedication to helping others."

Moelis co-founded L+M Development Partners, the first firm to integrate federal low-income-housing tax credits with New York City's Vacant Building Program. L+M has a long history of creating mixed-income rental and homeownership projects, while incorporating community outreach and sustainable building practices.

He is vice chairman of the New York State Association for Affordable Housing, and a governor of the Real Estate Board of New York.

Moelis, who earned induction to the order in 1982 based on his academic record (students must finish their sixth semester in the top 10 percent of their class and graduate magna cum laude), challenged the 2010 inductees to do good for the community. "Keep an open mind to using your education and skills to do things that are creative, interesting, and that you enjoy," he said. "There is a lot of good you can do, both in the law and outside of it."

 For the list of 2010 Coif inductees: [law.nyu.edu/2010mag/coif](http://law.nyu.edu/2010mag/coif)



## Law on a Wild Frontier

**T**OM ROSENSTOCK '05 RAN WITH THE bulls in Pamplona, climbed Mount Kilimanjaro, and once flew from New York to Qatar on four days' notice to visit a pal in the army. "He came halfway around the world just to have a beer," says the friend, Trayce Slumsky. So what might seem an unbelievable move for anyone else was right in character for Rosenstock: While traveling in the Middle East two years ago, he decided to stay in Afghanistan and open a law practice. "There's a whole wide world out there. Why would I live in one part of it?" Rosenstock asks. "It's like living in half of your house."

These days, he calls his house Maison Kabul. It is spartan but spacious, with brightly painted halls and a garden. Rosenstock, 31, shares it with a French diplomat and two expats from Canada and Poland, and exuberantly entertains an array of journalists, diplomats, and relief workers. Last year, he prepared a 24-pound bird for Thanksgiving and a 16-pound ham for Easter. And indeed, he filled both halves of Maison Kabul with friends.

Rosenstock's sense of adventure grew out of his international upbringing. His late father, Robert, was a foreign service diplomat and legal adviser to the United Nations, stationed in Geneva part-time. His mom, Gerda, is Austrian. In 2000, he received his B.A. in business from Washington University, where he started and ran a moving and storage company for three years during summer breaks. He also worked in construction and freelanced for the global management-consulting firm Accenture. "I'd like to try out every job before I die," Rosenstock says. In Kabul, he even joined a military convoy to experience firsthand the life of a mercenary.

Debating between attending business or law school, he chose NYU Law for its reputation in international law. "He was a very strong student, a good writer, and also resourceful," says Professor Emeritus Andreas Lowenfeld, who hired him as his research assistant. After graduation, Rosenstock spent nearly three years as a corporate associate at Paul, Weiss, Rifkind, Wharton & Garrison. Chafing under the strictures of big-firm life, he left in January 2008 to travel. He added Afghanistan to his

itinerary on the advice of a friend. "I only planned to stay a week. But on day eight, I didn't feel like buying a plane ticket, and on day nine, the same," he says. "Everyone in the U.S. was talking about the war. Here I was in Kabul, right in the middle of it." With both Afghan and international companies rushing to rebuild the country, billions of dollars' worth of reconstruction contracts were in play—so he hung a shingle.



Rosenstock attracted 200 participants, mostly local business owners, to a Commercial Contracts Roundtable in February 2009.

Most of Rosenstock's work focuses on contract negotiations for Afghan companies. Because the spoken word is more important than the written word among Afghan businessmen, and "a functioning court system is somewhere between a rumor and a fairy tale," Rosenstock says, contracts are nonexistent or ignored. "When the U.S. hires an Afghan subcontractor, it throws a pretty sophisticated contract on the table. My job is to help my client understand and negotiate it," he says. He also works the other side, advising U.S. companies doing business in Afghanistan. Rosenstock is not licensed to practice Afghan law, however, so he works with local attorneys. Last year, he helped an Afghan construction company recoup \$2 million, which the client then used to pay hundreds of laborers who might otherwise have turned to opposition groups to support themselves. "I've found the ideal organizational structure: a one-man operation in a war zone," he says. "It's also rewarding to know that the people I'm helping don't necessarily have another option." □ *Jennifer Frey*

# The Post-9/11 Challenge: Preserving Liberties



**N**INE YEARS AFTER THE 9/11 ATTACKS, the country is still grappling with how to balance civil liberties and national defense. And who better to speak to that tension than Jerrold Nadler, a Brooklyn Democrat who has represented

New York's Eighth Congressional District in the U.S. House of Representatives since 1992? He spoke about post-9/11 civil liberties at the annual Alumni Luncheon, held in the Waldorf-Astoria Hotel's Starlight Roof in January. His conclusion: Balance has a ways to go before it's restored.

The challenge now, said Nadler, chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, is getting the nation past what he considers flawed policies, akin to earlier civil liberties abuses in times of national distress, such as the Alien and Sedition Acts and the internment of Japanese Americans during World War II. "How do we set a new course to protect Americans, both from terrorism and from abuses at the hands of their own government?" he asked.

Nadler deemed the Obama administration's initial steps of condemning torture and promising to close Guantánamo a "good start," but he expressed disappointment in its subsequent actions. Among the

acts he decried was the administration's identification of 50 detainees it considered too dangerous to release but against whom it had insufficient evidence for a trial. He also suggested that the administration's manner of choosing among civilian trials, military tribunals, and indefinite detention was a violation of due process engineered to secure the government's desired outcome. Plus, he said, the use of the state secrets doctrine remains problematic.

"The state secrets doctrine, the way it's been asserted, lets the executive be the judge of its own conduct," Nadler said. "We must undo the state secrets doctrine as it is now or there will be no limits ultimately on executive power, and that is not a country we want to live in." He cited *Binyam Mohamed v. Jeppesen Dataplan, Inc.*, an extraordinary rendition case in the U.S. Court of Appeals for the Ninth Circuit, as an example of the abuse of the privilege.

"I am confident that when time has passed, we will teach in the law schools that this was a regrettable episode," Nadler said of the post-9/11 limitations on civil liberties. "Our job is to undo much of this and to get a proper balance to minimize the damage to people's rights and liberties now, and to prevent it from being institutionalized." □

## Social Enterprise Helps Rwandan Women Craft a Better Future

In 2008, after four years as a commercial litigation associate at Orrick, Herrington & Sutcliffe in New York, Benjamin Stone '04 (seated, lower right) took a 50 percent pay cut. And he couldn't be happier. Stone left Orrick to become senior vice president and general counsel of Indego Africa, a New York-based nonprofit founded by his college roommate, Matthew Mitro (kneeling, left), and—in an unusual form of pro bono—Orrick agreed to pay Stone's salary, an arrangement that continues to this day.

Indego Africa helps female survivors of the genocide in Rwanda by hiring the women to make handicrafts; selling their colorful baskets, yoga bags, laptop sleeves, and wine coasters online and in U.S. stores; then putting the profits toward training the women to run a business on their own. "These handicrafts are an engine to get at much longer-term sustainability," says Stone.

In addition to being guaranteed a fair wage, the 250 artisans working for Indego can take classes in financial management, entrepreneurship, and computer literacy. "There are no handouts," says Stone. "The women have earned all the training they've gotten, and it leads to a different sense of ownership and a pride in what they're



doing." Indego is, in effect, two enterprises in one: a retailer and a business school. "I don't think that those two components independent of each other would have as much long-term social impact," says Stone. Eventually the group hopes to expand into neighboring countries. "Our end goal," he says, "is to change the conversation about what fair trade can do for people."

Indego's distinctive form of social entrepreneurship is already attracting attention.

Harvard Business School Professor Kathleen McGinn is deeply interested in Mitro and Stone's unusual business model, which concentrated on building an infrastructure before raising funds. Her case study of Indego will be published this fall.

As a lawyer, entrepreneur, and amateur photographer, Stone has found his calling: "I get to draw on all my passions and focus them onto one objective, which is to work with these women and make a difference."



# A Labor Force of One

The new No. 3 at the U.S. Department of Labor brings a relentless, lifelong defense of worker rights.



Smith and Dean Richard Revesz with students Alison Peyser '11, Sabrina Ursaner '10, and Adrienne Rose '11.

**W**HEN WILD MUSHROOMS APPEAR in the woods behind her upstate weekend cabin, M. Patricia Smith '77, the newly installed solicitor of the U.S. Department of Labor, heads out to pick the delicacies. "I've taught myself which ones you can eat and which ones you can't," she says. But navigating the tricky terrain of Washington, D.C., has proven a bit tougher.

In her 20 years at the New York State Attorney General's office and three years as commissioner of the New York State Department of Labor, Smith fought effectively to enforce fair-wage and other labor laws. The *New York Times* called her "one of the nation's foremost labor commissioners." But Smith, 57, stepped into the No. 3 post at the Labor Department only after a bruising 11-month confirmation battle. "It's been an unexpectedly difficult process," she says. Now the transplanted Brooklynite is looking forward to waging battles of her own in the courtroom.

Smith traces her affinity for helping workers to her upbringing in western Pennsylvania's mining country, where her grandfather was the coal miners' principal doctor. Often the men he tried to save after a mine disaster were men he'd delivered as babies. Her father, Perry, 81, also a doctor, treated coal miners and their families, too. "We were always around the coal mines," says Smith. "I was influenced by the dangerousness of

the work and the job that the unions were doing on the workers' behalf."

She graduated from Trinity College in Washington, D.C., in 1974 with a degree in political science. Ruling out medicine after fainting at the sight of blood, Smith turned to law, choosing NYU because of the school's commitment to public interest law. She chaired the Law Women, which honored her in February as its 2010 alumna of the year, and took every labor law class NYU offered. "I was always drawn to the world of work," she says. "When I go into a restaurant I wonder, Is the tip going to the waiter? When I walk into my dry cleaner I ask myself, Is the person behind the counter getting the minimum wage?"

She began her career as a legal aid lawyer, then joined the New York AG's office in 1987. As part of the Labor Bureau, where she rose through the ranks to chief in 1999, she won two cases before the U.S. Supreme Court and built a reputation for championing underpaid workers.

Along with then-Attorney General Eliot Spitzer, Smith went after grocery store chains for violating minimum wage and overtime laws, recouping \$6 million in 2000 for Food Emporium and Gristedes delivery men, who had been earning just \$2 an hour. In 2001, her office won \$315,000 in back pay from three greengrocers and persuaded another 200 to sign an agreement of compliance. In 2004, she led

a crackdown on Royal Flush Bathroom Attendants, a service that supplied workers to dozens of Manhattan restaurants and nightclubs. Not only did the employees earn only tips, but they also had to return a percentage of the money to Royal Flush. That same year, she helped win \$450,000 for pushcart vendors in Central Park, who often made just \$60 a day selling hot dogs, pretzels, and ice cream.

When she became the state's labor commissioner in 2007, Smith continued to lean on employers, recovering a record \$50 million in back pay before leaving office in February 2010. "Some small business owners felt she was too aggressive. But you have to get the bad apples out of the system," says Ken Adams, president of the Business Council of New York State. "We didn't agree on every issue, but she was an honest broker, direct and sincere in her desire to hear both sides of the story."

In January 2009, Hilda Solis, the U.S. secretary of labor, asked Smith to be solicitor. "I said yes. Then I sat down and cried," she recalls. "I had a home in Brooklyn, parents to take care of, and I was very happy with the job I had." But the post would allow her to do more lawyering and less policymaking—a welcome change.

Not long afterward, her appointment hit a roadblock. In August, Republican Sen. Mike Enzi of Wyoming asked the president to withdraw the nomination on the grounds that Smith had misled a Senate committee about her Wage and Hour Watch program at the New York State Department of Labor. The program was modeled on a neighborhood watch, and encouraged community groups and labor unions to look out for wage violations. Enzi argued the program "endow[ed] union organizers and community activist groups... with vigilante power." Smith countered that the program was designed to raise awareness of labor laws, not to enforce them. The Senate confirmed her in February 2010 by a 60-to-37 vote.

As solicitor, Smith will oversee 500 lawyers working on occupational safety, wage and hour standards, and unemployment insurance benefits. She'll handle a mix of litigation, representing plaintiffs and defendants, as well as appellate work. "I get to be a lawyer again. I like analyzing cases, figuring out how to use the law to get from A to B," she says. And besides, she adds, "I have a feeling that maybe I'm needed there." □ *Jennifer Frey*



For more alumni in the Obama administration:  
[law.nyu.edu/2010mag/obama](http://law.nyu.edu/2010mag/obama)

# Ditching the Law



**A** DESCENDANT OF A LONG LINE OF distinguished lawyers, including presidents John Adams and John Quincy Adams, Dan Adams '65 appeared destined to practice law. But virtually getting fired by a corporate law firm nearly 40 years ago allowed him to embrace the career that suits him much better: running a succession of cutting-edge biotech firms. Adams, now executive chairman of flu-vaccine maker Protein Sciences, was a guest at the Dean's Roundtable last March, during which he discussed the many steps on his path to the executive office.

While a shift from law to biotech might seem an unconventional career move, Adams's father had made a similar bold switch. Allan Adams was a chemist who became a turnaround consultant, helping failing businesses become profitable. His mother, Helen, a homemaker, taught him how to balance budgets.

Dan majored in chemistry at Cornell, with minors in math and physics. But he realized when he graduated that working in a lab was not for him. He earned a J.D. from NYU Law instead, where he was an executive editor of the *Law Review* along with classmate and current NYU Law Professor William Nelson '65. Adams then joined Sullivan & Cromwell in its New York headquarters, where he worked on mergers and acquisitions and initial public offerings. Even then, Adams admits, "I enjoyed learning about the companies more than making the deals."

Underscoring that point, in 1970 he was assigned to a merger that he just couldn't abide: "After doing some research, I said I thought it was a crazy idea." A senior partner reminded him that he was a lawyer, and it was not his job to disagree with his client's corporate strategy. "He said, 'I know, you want to run a company, and we are going to make that easy for you,'" Adams recalls. The merger went through, but without Adams's assistance. He was encouraged to find another job.

During his tenure at Sullivan & Cromwell, Adams had served more than a year in the U.S. military, stationed in Korea and Southeast Asia, where he commanded a force of about 100 men. "In the military I learned one of the most important business lessons I know, and that's successful teamwork," he says. That leadership experience, plus his willingness to take risks and his business acumen, helped him to turn in an entirely new direction. Adams landed at one of Sullivan & Cromwell's corporate clients, International Nickel, a metals exploration company. He would eventually run the venture capital division, which sought new projects to invest in. Soon he noticed that biotech was attracting an increasing number of investment-savvy companies. "I thought, I can't compete with these guys' investment expertise," he says. But he figured he could profit from the trend if he applied his business and science training to help create a biotech company those experts would want to invest in.

So in 1977 he co-founded Biogen, which used genetic technology to develop Avonex, a multiple sclerosis treatment. Next he started Advanced Genetic Sciences, the first company to genetically engineer plants, and Plant Genetic Systems, the first European agricultural biotechnology company, followed in 1989 by AlleRx, dedicated to curing food allergies.

Adams became CEO of Protein Sciences in 1996 after it had lost its source of funding, essentially rendering it bankrupt. He learned something his dad had said was true: Turning a company around is more difficult than starting a new one. But his hard work, which included lots of fundraising and recruiting a new team of executives, paid off. Last June a division of the U.S. Department of Health and Human Services signed a five-year, \$147 million contract for Protein Sciences to develop FluBlok, a seasonal and pandemic flu vaccine.

Adams stepped down from his CEO position in February 2010 to become executive chairman and, on an interim basis, head of business development. The company's future seems promising: FluBlok is expected to receive FDA approval later this year, and Adams believes it could become a blockbuster, billion-dollar product.

Looking back over his career, Adams says his legal training was invaluable to his success. "Legal thinking is crisp. You have to be able to separate what is important from what isn't to try a case successfully," he says. "That kind of thinking is very helpful to businesspeople."

Case closed. □ *Amanda Walker*

## Roundtable Guests

During 2009-10 Dean Richard Revesz also invited these prominent alumni to intimate luncheons with students.

### **Anne Chwat '87**

EVP, General Counsel, and Chief Ethics and Compliance Officer, Burger King

### **Michael Lewitt '85 (LL.M. '88)**

President, Hegemony Capital Management

### **Yves Sisteron (M.C.J. '83)**

Managing Partner and Co-Founder, GRP Capital

### **John Suydam '85**

Chief Legal and Administrative Officer, Apollo Management

### **Jeffrey Tannenbaum J.D./M.B.A. '88**

Founder and President, Fir Tree Partners



## Classes at the Waldorf

The 2010 Reunion program included daytime academic panels featuring Professors Stephen Gillers '68 on ethics in popular culture, Ryan Goodman on human rights, and Geoffrey Miller on the economic crisis, and Lewis Steinberg '84 (LL.M. '92) on President Obama's policies. At the awards luncheon, the Law Alumni association honored Life Trustee John Creedon '55 (LL.M. '62), with the Judge Edward Weinfeld '21 Award; Kenneth Feinberg '70, with the Alumni Achievement Award; Sharon Hom '80, with the Public Service Award; Jason Yat-Sen Li (LL.M. '00), with the Recent Graduate Award; and Professor Emeritus John Slain '55, with the Legal Teaching Award. Festivities followed at the Waldorf-Astoria Hotel.



# In Memoriam

Gifted lawyer and Brooklyn Law Professor Eve Cary '71 passed away on September 29, 2009. An outpouring of tributes and remembrances celebrated her accomplished life. Among the most notable was a tribute by Justice Ruth Bader Ginsburg, which is excerpted below.

**I**N THE SUMMER OF 1970, NYU LAW student Eve Cary was assisting the lawyers at NYCLU. Mel Wulf, then legal director of the ACLU, enlisted her for a special assignment. The Idaho Supreme Court had just decided *Reed v. Reed*. That court upheld against constitutional challenge an estate administration statute that read: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." A jurisdictional statement was needed to appeal to the U.S. Supreme Court, and Mel asked Eve to help him compose it. (At the time, no woman served as staff counsel at the ACLU or the NYCLU.)

*Reed* became a historic first, in which the Supreme Court declared that a law discriminating against women violated the Fourteenth Amendment's Equal Protection Clause. Eve's hand, mind, and heart were there at the very beginning, a full year and a half before the ACLU, sparked by *Reed*, launched its Women's Rights Project.

The first woman to serve as staff counsel at NYCLU, Eve litigated path-making cases in the 1970s involving the First Amendment, the rights of prisoners, and genuinely equal opportunities for women. To this day, I preserve among my favorite briefs one she filed in the New York Court of Appeals in 1973, in *Sontag v. Bronstein*. Eve was attorney for the appellant, Marilyn Sontag.

In 1970, Sontag had been engaged at Hunter College as an audio-visual-aid technician. Some two years later, despite her capable performance on the job, she was disqualified for failure to pass a newly devised test that required lifting a 25-pound barbell overhead with one hand. Sontag was unable to lift the weight higher than her shoulder. All the men taking the test passed. The only other woman put to the test also failed. Eve's winning brief left no stone unturned. My



favorite line from it: "[W]omen throughout history have proven themselves capable of lifting and carrying 25-pound weights—the weight of an infant between 12 and 18 months [old]." Women did not carry that weight overhead, of course, but in a far more sensible and protective way. Eve's argument and briefing yielded a resounding victory. A test neutral in form but disparate in impact would no longer escape attentive review.

As the barbell case illustrates, Eve lived to see great changes in women's chances, and she was an active participant in making them happen. She did so—as she did all else in her lawyering and teaching careers—without fanfare, but with unrelenting persistence and something more of surpassing importance. She had an irreverent, unfailing sense of humor, the kind that helps one through life's trials and dark days. She was also an uncommonly caring person. The French word *sympathique* fit her to a T.

I count it my great good fortune to have known Eve Cary as co-worker, from days when we were rather young. She was taken from our midst far too soon. But her wit and wisdom, her brave and bright spirit will continue to uplift and encourage the legions whose lives she touched.

## A Call to Reform New York's Juvenile Prisons

New York State's juvenile justice system is deeply flawed, with unsafe conditions in the prisons; youth held for minor offenses living alongside violent criminals; and too few counselors for the many young people with drug, alcohol, and mental-health problems. That's the conclusion of a report issued last December by New York State Governor David Paterson's Task Force on Transforming Juvenile Justice, chaired by Jeremy Travis '82, president of the John Jay College of Criminal Justice.

"The conditions of confinement were shocking," says Travis. "What was troubling on a different level was the fact that this system has been allowed to operate basically outside of public view for a long time. Transparency and accountability became key themes of the work of our task force." The report, "Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State," was released a few months after a U.S. Department of Justice investigation uncovered excessive force in state juvenile facilities.

The task force found that more than half of the juvenile offenders were sent to detention centers for the equivalent of misdemeanors. Recidivism rates remain high, and only 55 mental-health practitioners care for more than 1,600 juveniles annually. The report's recommendations include limiting detention to those who represent a significant risk to public safety; expanding state-funded, community-based alternatives; and establishing an independent oversight body for the system.



JEREMY TRAVIS: GARY ZARAGOVITCH



## Give and Receive: Donors and Scholars Meet



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1 Otterbourg, Steindler, Houston & Rosen Scholar Samuel Welt '11 with David Morse '83; 2 John J. Creedon Scholars Eric Mulligan '11 and Jordan Woody '12 with Diane Creedon and Life Trustee John Creedon '55 (LL.M. '62); 3 Wilf Tax Scholars Brian Beck (LL.M. '10) and Dean Krishna (LL.M. '10) with Trustee Leonard Wilf (LL.M. '77); 4 Deborah Rachel Linfield Fellow Amalea Smirniotopoulos '10 with Trudy and Jordan Linfield; 5 Sylvan D. Freedman Memorial Scholar Amanda Cats-Baril '11 with Patricia and Alan Rosof '71; 6 Donald L. Brown Memorial Scholar Anqi Zhang (LL.M. '10), Arthur T. Vanderbilt Scholars Lu Chen '12, Xu Chen (LL.M. '10), and Ruiqing Wang (LL.M. '10), and T.D. Kenneson Scholar Qiuju Wei (LL.M. '10); 7 AnBryce Professor of Law Deborah Malamud with AnBryce Scholars Angela Libby '11, Isaly Judd '11, and Sean Aasen '11.

## Notable Alumni Career Highlights

The Women's Bar Association of the District of Columbia named **Nancy Duff Campbell '68** the 2010 Woman Lawyer of the Year.

Producer **Steven M. Engel '78** won a 2009 Emmy for Outstanding Informational Long Form Programming for *A Walk to Beautiful*.

**David Thurm '78** was appointed chief operating officer of the Art Institute of Chicago last March.

**Kent Hirozawa '82** was named chief counsel for Mark Gaston Pearce of the National Labor Relations Board.

The Hispanic National Bar Association honored **Jenny Rivera '85** with its Presidential Advocacy Award last September. She recently served as special deputy attorney general for civil rights.

**Michael Danilack '86 (LL.M. '90)** was named deputy commissioner (international) of the Internal Revenue Service Large and Mid-Size Business Division in January.

**Maria Vullo '87** became New York's new executive deputy attorney general for economic justice in February.

**Seth Diamond '88** became commissioner of New York City's Department of Homeless Services in May.

**Debo Adegbile '94** was named one of the 100 emerging and established African-American leaders by *The Root*.

The *Philadelphia Inquirer* named **Lourdes Rosado '95**, an attorney at the Juvenile Law Center, 2009 Citizen of the Year.

 [law.nyu.edu/2010mag/applause](http://law.nyu.edu/2010mag/applause)

## Vanderbilt Medal

**Charles Klein '63**, NYU School of Law trustee and managing director of American Securities, received the Law School's highest alumni honor, the Arthur T. Vanderbilt Medal, in April. A founding partner of private equity funds that total more than \$4 billion in commitments and assets, Klein was previously an analyst at Lehman Brothers and Bear Stearns and an attorney specializing in litigation. He created the Charles D. Klein Scholarship for Law and Business in 2004, and he and Jerome Manning '52, both Carroll and Milton Petrie Foundation trustees, together established the Petrie Scholarships and the Bernard Petrie Professorship of Law and Business in 2008.



# A Chat with Kenneth Feinberg '70

Time after time, when judges, attorneys general, or others have needed to compensate victims or determine the fair value of anything from the Zapruder film to a bailed-out bank's executive pay, they turn to the blunt-spoken and opinionated founder of Feinberg Rozen. Since 1988 Kenneth Feinberg, 64, has directed compensation funds for victims of Agent Orange, the Dalkon Shield, and, most notably, 9/11. A one-time chief of staff for Senator Ted Kennedy, Feinberg spoke this April with our Michael Orey about his high-profile undertakings. In June, Feinberg announced he would step down after more than a year as the Treasury Department's special master for TARP executive compensation to accept President Obama's request to administer the \$20 billion fund created by BP to pay victims of the massive Gulf of Mexico oil spill.

**W**hat are the common strategies you employ to deal with these unique assignments? Get very, very good people to help you. Think out of the box, because the problems are out of the box. Maintain a high degree of creativity in developing procedures and substantive solutions. Promote transparency and open handedness. Make sure you apply principles consistently, so there's not the slightest tint of bias or favoritism.

**What is a fair resolution?** Now that could be a law school seminar! The elements are: 1. The statute, which in most cases circumscribes my authority. 2. The objective—what do we seek to achieve by valuing lives, distributing money? 3. The politics—what does the public, the taxpayer, expect? And, 4. apply consistency and openness as a surrogate for fairness, so that the process is transparent and people view it as appropriate and just.

**You've said you emerged after 9/11 "not the same person." How so?** I've become much more fatalistic. Those victims left their homes that morning, said goodbye to loved ones, and never saw them again. I tell students, "Don't plan too far ahead." I'm also a better listener. At the beginning of the 9/11 fund, I dictated like a lawyer; after a while I learned that most victims wanted to vent and I was better off listening, which I did.

**How do you talk a banker into forgoing his pay for a year?** One, he has no choice but to accept it; I have the power under the law to impose it. But more important, I try to minimize the downstream consequences of pay. I'll say, "Look, if you don't do it, Congress will call a hearing, ask you to testify, make you a political target, and there will be pickets at your house." Why not do it? At a time when there is such economic uncertainty and populist anger, I try to be viewed as a friend, not a foe.

**Has being pay czar changed your views?** What I've learned is there's a huge gap between Wall Street perceptions of worth and Main Street perceptions. It is not a gap; it is a chasm. Wall Street pay is all out of proportion. It is excessive.

**How do you deal with the very public criticism of you, your manner, your methodology, your sensitivity?** That criticism is balanced by the fact that you have others who are very supportive. Anybody trying to distribute money to Vietnam veterans; anybody reducing pay on Wall Street, but not reducing it to the level that Main Street would like to see; anybody distributing money to grieving families months after 9/11—criticism goes with the territory. You come to expect it, you can't let it influence you.

**You often try to achieve consensus. Why is there so much polarization in Washington on so many issues now?** A couple of reasons. The extraordinary growth and transformation of the media—with cable and 24-hour news bites—invite newsworthiness in the form of polarization, criticism; and historically, right now you lack the type of moral leaders, institutional leaders of the Senate who are able through force of personality to forge consensus. There is no Senator Kennedy, no Scoop Jackson, no Jacob Javits. There are no, or few, giants who are able to forge that type of bipartisanship now.

**Why do you keep taking these daunting assignments?** It's not easy to say no to Secretary Timothy Geithner, Attorney General John Ashcroft, and particularly Judge Jack Weinstein. And these are discrete assignments; it's not like a 10-year litigation. You come in, study it, propose a resolution, resolve it, and get out. Plus, I say half jokingly that the bar of success is quite low. □





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